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**From:** [REDACTED]  
**Sent:** 25/07/2023 7:54:12 AM  
**To:** Council Northernbeaches Mailbox  
**Cc:** Joe Hauser; Les Randolph; [REDACTED]; Steve Filletti; Ernie Webber; Deidre Mcalinden  
**Subject:** DA 2023 0868 37 HAY STREET COLLAROY NSW 2097 WRITTEN SUBMISSION: LETTER OF OBJECTION SUBMISSION: TULLOCH  
**Attachments:** 37 HAY WS.pdf;

Kind regards,

Bill Tulloch BSc[Arch]BArch[Hons1]UNSW RIBA RAIA  
[REDACTED]

# SUBMISSION

a written submission by way of objection

BILL TULLOCH BSC [ARCH] BARCH [HONS1] UNSW RIBA RAIA

prepared for

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24 JULY 2023

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RE: DA 2023 0868  
37 HAY STREET COLLAROY NSW 2097  
WRITTEN SUBMISSION: LETTER OF OBJECTION  
SUBMISSION: TULLOCH

Dear Sir,

This document is a written submission by way of objection lodged under Section 4.15 of the EPAA 1979 [the EPA Act].

I have been instructed by my clients to prepare an objection to this DA.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, my clients ask Council to REFUSE this DA.

## CONTENTS

## A. EXECUTIVE SUMMARY

## B. FACTS

## 1. THE PROPOSAL

## 2. THE SITE

## 3. THE LOCALITY

## 4. STATUTORY CONTROLS

## C. CONTENTIONS THAT THE APPLICATION BE REFUSED

1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the following provisions of the State Environmental Planning Policy (Housing) 2021
2. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the desired future character
3. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the 'General Principles of Development Control'. Part 4, Section 40, 52, 61, 62, 63A, 65, 66, 67, 76,
4. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Schedule 16, Clause 21 Neighbourhood amenity and streetscape the Warringah Local Environmental Plan 2000.
5. Pursuant to Section 4.15 (1) (b) and (c) of the Environmental Planning and Assessment Act 1979 the proposed development is unsuitable for the site. In particular the proposal exceeds the threshold considerations for 'low intensity low impact' development as established within *Vigour Master Pty v Warringah Shire Council* [2003] NSWLEC 1128
6. Pursuant to Section 4.15 (1) (e) of the Environmental Planning and Assessment Act 1979 the proposed development is not in the public interest. In particular, the proposal does not meet the provisions of the relevant local environmental planning instrument for the creation of a better environment and maintaining the desired future character of the locality.

7. Impacts Upon Adjoining Properties: Adverse View Loss Impacts
8. Impacts Upon Adjoining Properties: View Loss Caused by Poor Strategic Positioning of Tree Canopy
9. Impacts Upon Adjoining Properties: Adverse Overshadowing Impacts
10. Impacts Upon Adjoining Properties: Adverse Privacy Impacts
11. Impacts Upon Adjoining Properties: Excavation, Geotechnical, Stormwater, Flood Impacts
12. Impacts Upon Adjoining Properties: Traffic
13. Precedent
14. Public Interest

D. CONTENTIONS THAT RELATE TO INSUFFICIENT INFORMATION

E. REQUEST FOR AMENDED PLANS TO BE SUBMITTED TO BETTER ADDRESS IMPACTS UPON ADJOINING PROPERTIES

F. REASONS FOR REFUSAL

G. CONCLUSION

## A. EXECUTIVE SUMMARY

The design of the proposed development does not ensure that the existing high levels of amenity to my clients' property are retained.

The proposal is considered to be inappropriate within the streetscape.

The bulk, scale, density and height of the proposed development is excessive and inconsistent with the established and desired streetscape character.

The subject site is zoned R2 Low Density Residential under the LEP, and there is no reason, unique or otherwise why a fully compliant solution to SEPP, LEP and DCP controls cannot be designed on the site.

The site is zoned R2 Low Density Residential. The objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low-density residential environment.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposal fails to accord with the R2 Objectives.

The *Northern Beaches Local Housing Strategy (LHS)* looks at the mix of housing in the Northern Beaches Local Government Area (LGA) today, and at the kind of housing that will be needed in the future.

Council will note that under *Priority 2: Detailed Planning for Centres*, Council have decided, quite correctly, to "Establish sufficient capacity to accommodate housing demand around existing centres".

Furthermore, Council have decided that:

*"...In the short term, low-rise housing diversity areas will be investigated within 400m of select centres for dual occupancies, seniors housing and boarding houses."*

Council have also decided that seniors housing should primarily be focused in low rise housing diversity area, identifying:

*"...Avalon, Newport, Warriewood, Belrose, Freshwater, Balgowlah and Manly as areas to support housing diversity in the form of dual occupancies, seniors housing and boarding houses."*

This proposal does not accord with Council's Northern Beaches Local Housing Strategy (LHS), positioning a massive built form within R2 residential dwellings.

Council will note that over the past two years refusals have been issued by NBLPP and NBC DDP on numerous Seniors Housing proposals that do not accord with Council's Northern Beaches Local Housing Strategy (LHS).

These DA were refused for multiple reasons, however *'character'* and *'low impact'* featured in most of the assessments. Loss of neighbour's amenity featured in all of the refusals.

- Newport: DA 2023 0045 [June 2023 Refusal NBLPP]
- Narraweena: DA 2022 0616 [July 2023 Refusal NBLPP]
- Collaroy: DA 2021 1805
- Bayview: DA 2021 1963
- Belrose: DA 2020 0563

There are also multiple other refusals by NBLPP and NBC DDP on other SEPP proposals:

- DA 2022/ 0596
- DA 2021/ 0179, 0311, 1039, 1039, 1506, 1597, 2141
- DA 2020/ 0559, 1441

Once again, these DA were refused for multiple reasons, however *'character'* and *'low impact'* featured in most of the assessments. Loss of neighbour's amenity featured in all of the refusals.

This proposal fails to provide adequate streetscape outcomes, presenting a 56m long built form, that is highly visible from the street, from Griffith Park and foreshore areas.

The proposal is excessive in scale, has adverse impacts on the visual amenity of the environment, does not positively contribute to the streetscape in terms of an adequately landscaped setting. The proposal is visually dominant, and is incompatible with the desired future townscape area character.

The applicant has not prepared visual montages from the corner of Pittwater Road and Anzac Avenue adjacent 997 Pittwater Road to assess the impact. No visual impact study has been prepared from Griffith Park. Both viewpoints will show the visually dominate character of the proposed development, and the incompatibility with the desired future townscape area character. The applicant has carefully avoided showing those outcomes. Further viewpoints from higher vantage points in Hay Street and Anzac Avenue, and from my client's property, will show the unacceptable character.

The proposal will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual bulk impact. The development has excessive bulk and scale and fails to comply with development standards set out in the LEP, resulting in a building which has unacceptable adverse impacts on neighbouring properties and the locality. The non-compliant building envelope will lead to unacceptable visual bulk impact to neighbours.

The multiple non-compliances arising from the proposed upper floor level indicates that the proposed development cannot achieve the underlying objectives of this control, resulting in an unacceptable building bulk when viewed from adjoining and nearby properties.

The development presents an inappropriate response to the site and an unsatisfactory response to the desired future character of the area.

I contend that the DA be REFUSED for the following reasons:

- Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the following provisions of the State Environmental Planning Policy (Housing) 202;
- Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the desired future character
- Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the 'General Principles of Development Control'. Part 4, Section 40, 52, 61, 62, 63A, 65, 66, 67, 76
- Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Schedule 16, Clause 21 Neighbourhood amenity and streetscape (sub-clauses 'a', 'c' and 'd') the Warringah Local Environmental Plan 2000.
- Pursuant to Section 4.15 (1) (b) and (c) of the Environmental Planning and Assessment Act 1979 the proposed development is unsuitable for the site. In particular the proposal exceeds the threshold considerations for 'low intensity low impact' development as established within *Vigour Master Pty v Warringah Shire Council* [2003] NSWLEC 1128
- Pursuant to Section 4.15 (1) (e) of the Environmental Planning and Assessment Act 1979 the proposed development is not in the public interest. In particular, the proposal does not meet the provisions of the relevant local environmental planning instrument for the creation of a better environment and maintaining the desired future character of the locality.

The essence of the neighbour's concern is that the proposal exceeds the threshold considerations for 'low intensity low impact' development as established within *Vigour Master Pty v Warringah Shire Council* [2003] NSWLEC 1128:

- Presents a proposed 56.5m x 34m x 9.5m high, unrelenting, block structure that is not '*low intensity low impact*' development in an R2 zone
- The desired future character of the locality will forever change to that which gives the clear impression of a multi-storey apartment building, not only facing two suburban streets, but also on view from nearby Griffith Park, and the zones around the beachfront.
- The proposed development is significantly higher than neighbouring dwellings, with substantial non-compliant FSR, wall height, setback and density.

A more skilful design solution would have been to create *a series of pavilions* that are completely separated above ground to reduce the bulk and scale of a relentless, unbroken, 56.5m façade. A built form complying with wall height controls

and all setback controls is essential. Reductions to the built form to better share the ocean views is required.

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts that result in adverse impacts on my clients' property.

- Unacceptable Adverse Devastating View Loss Impacts from Neighbours
- Unacceptable Adverse Devastating View Loss Impacts from Public Domain
- Unacceptable Adverse Solar Loss Impacts
- Unacceptable Adverse Visual Privacy Impacts
- Unacceptable Adverse Visual Bulk and Scale Impacts
- Unacceptable Adverse Landscape Impacts
- Unacceptable Adverse Engineering Impacts
- Unacceptable Adverse Traffic Impacts
- Unacceptable Removal of Trees, frequented by the protected Tawny Frogmouth Owls and the threatened Powerful Owls.

The proposed development fails to meet SEPP and Council's planning controls, the objectives and the merit assessment provisions relating to:

- Exceedance of Floor Space Ratio [FSR]: Proposed 0.75:1 v Control 0.5:1 [50% non-compliance]

The proposed development fails to meet Council's planning controls, the objectives and the merit assessment provisions relating to:

- Excessive Building Height [HOB]
- Excessive Wall Height [WH]
- Setbacks [SB]

The proposed development is incapable of consent, as there is a substantial list of incomplete information that has yet to be provided, including:

- View Loss Analysis from my client's property
- Solar Loss Analysis at hourly intervals, with elevational diagrams showing existing and proposed and percentage loss
- Privacy Analysis
- Registered Surveyors levels transferred to all DA drawings
- Incomplete dimensioning
- Inadequate basement storage

The proposed development represents an unreasonably large building design, for which there are design alternatives to achieve a reasonable development outcome on the site without having such impacts.

The Applicant's Clause 4.6 written request does not adequately demonstrate that the proposal achieves the relevant objectives of the development standards, or that there are sufficient environmental planning grounds to justify the extent of the proposed variations sought. The variations would result in undue visual bulk that would be inconsistent with the desired future character of the locality.



The proposed development does not satisfy the objectives of the zone or contribute to a scale that is consistent with the desired character of the locality and the scale of surrounding development.

A compliant building design would reduce the amenity impacts identified.

My clients agree with Roseth SC in NSWLEC *Pafbum v North Sydney Council*:

*"People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime."*

The 'legitimate expectation' that my clients had as a neighbour was for a development that would not result in very poor amenity outcomes caused directly from the non-compliance to building envelope controls.

My clients wish to emphasise the fact that my clients take no pleasure in objecting to their neighbour's DA.

The proposed DA has a deleterious impact on the amenity of their property caused by the DA being non-compliant to controls.

Council and NSWLEC Commissioners regularly concede that development standards and building envelopes provide for maximums and that there is no entitlement to achieve those maximums.

It does seem unreasonable that the Applicants wish to remove my client's amenity to improve their own, and is proposing non-compliant outcomes that would seriously adversely affect my clients' amenity.

Council's development controls relating to managing building bulk and scale are designed to ensure that buildings are consistent with the height and scale of the desired character of the locality, are compatible with the height and scale of surrounding and nearby development, respond sensitively to the natural topography and allow for reasonable sharing of views and visual amenity.

Council's DCP with respect to the locality, requires that development respond to the natural environment and minimise the bulk and scale of buildings. The proposed development in its current form does not achieve this and provides inadequate pervious landscaped area at ground level.

The proposal does not succeed when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, does not succeed on merit and is not worthy of the granting of development consent.

The proposed development fails the fundamental principles of design excellence in terms of:

- Context and local character
- Built form, scale and public domain, urban design response
- Density & Inappropriate Mix of Units

- Safety
- Landscape integration
- Architectural expression
- Amenity impacts on neighbours

Council should note that spot survey levels and contour lines from the Registered Surveyors drawings have not been adequately transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessment of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA. The plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment, including incomplete dimensional set-out and incomplete levels on drawings to define the proposed building envelope. There is incomplete analysis provided including view loss, solar loss and privacy loss.

The Popov Base drawings show the four lots as 17.3m wide along the eastern boundary.

The CMS survey shows Lot 46 at 17.3m. Lots 41, 39, and 37 are only 15.24m wide. It appears that the Popov Base drawings are set up from the CMS drawings, however the three lots are shown wider by figured dimensions. The eastern boundary from CMS survey should be a total of 63.02m in length across the four lots.

There is no Anzac Avenue setback dimension shown. The dimension scales at a non-compliant 3.0m at the upper levels.

I am unsure as to the accuracy of all dimensions that are labelled, considering these discrepancies.

My clients ask Council to seek modifications to this DA as the proposed development does not comply with the planning regime, by non-compliance to development standards, and this non-compliance leads directly to my clients' amenity loss.

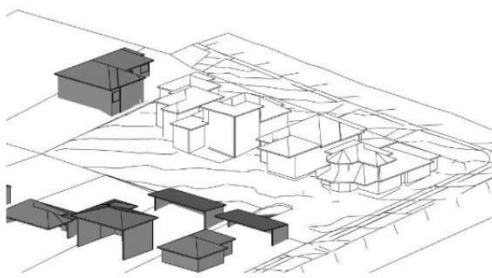
If any Amended Plan Submission is made by the Applicant, and re-notification is waived by Council, my clients ask Council to inform them immediately by email of those amended plans, so that my clients can inspect those drawings on the Council website.



The proposed development presents as a 56.5m long block form to the east and west elevations. Wall heights are non-compliant. Excessive built form in the setback zones. Elevated structures built onto the eastern boundary. The proposed 56.5m x 34m x 9.5m high, unrelenting, block structure is not 'low intensity low impact' development. This is a direct result of an unacceptable FSR. A 'multi-pavilion' solution of smaller individual elements would be the more skilful design consideration.



The proposed development facing Anzac Avenue presents non-compliant wall height and non-compliant rear and street setback, with excessive built form in both setback zones. The building does not step with slope. The 34m long facades are excessive. This is a direct result of an unacceptable FSR – in simple terms, the bulk of the building is 50% larger than it should be.



The solar diagram shows the intensity of development compared with the existing situation. The non-compliant FSR increase to 0.75:1 is both unreasonable and unacceptable.

## B. FACTS

### 1. THE PROPOSAL

The development application seeks approval for demolition of the existing dwellings and construction of a seniors housing development comprising 11 x 3-bedroom independent living units over a basement level of car parking.

### 2. THE SITE

The site is identified as Nos. 37 – 43 Hay Street, Collaroy and comprises Lots 43 – 46 Section 12 Deposited Plan 10648. The site is regular in shape, has an area of 2,839.1sqm and has frontages to Hay Street of 60.885 metres and Anzac Avenue of 42.945 metres (with a splay corner of 3.02 metres). Each existing lot comprises a dwelling house, ancillary structures and vegetation as identified upon the Survey Plan.

### 3. THE LOCALITY

The existing character of the local area, including the immediate visual catchment (generally within 150 metres of the site) is of a well-established neighbourhood, made up of a heterogeneous mix of dwelling types within domestic landscaped settings.

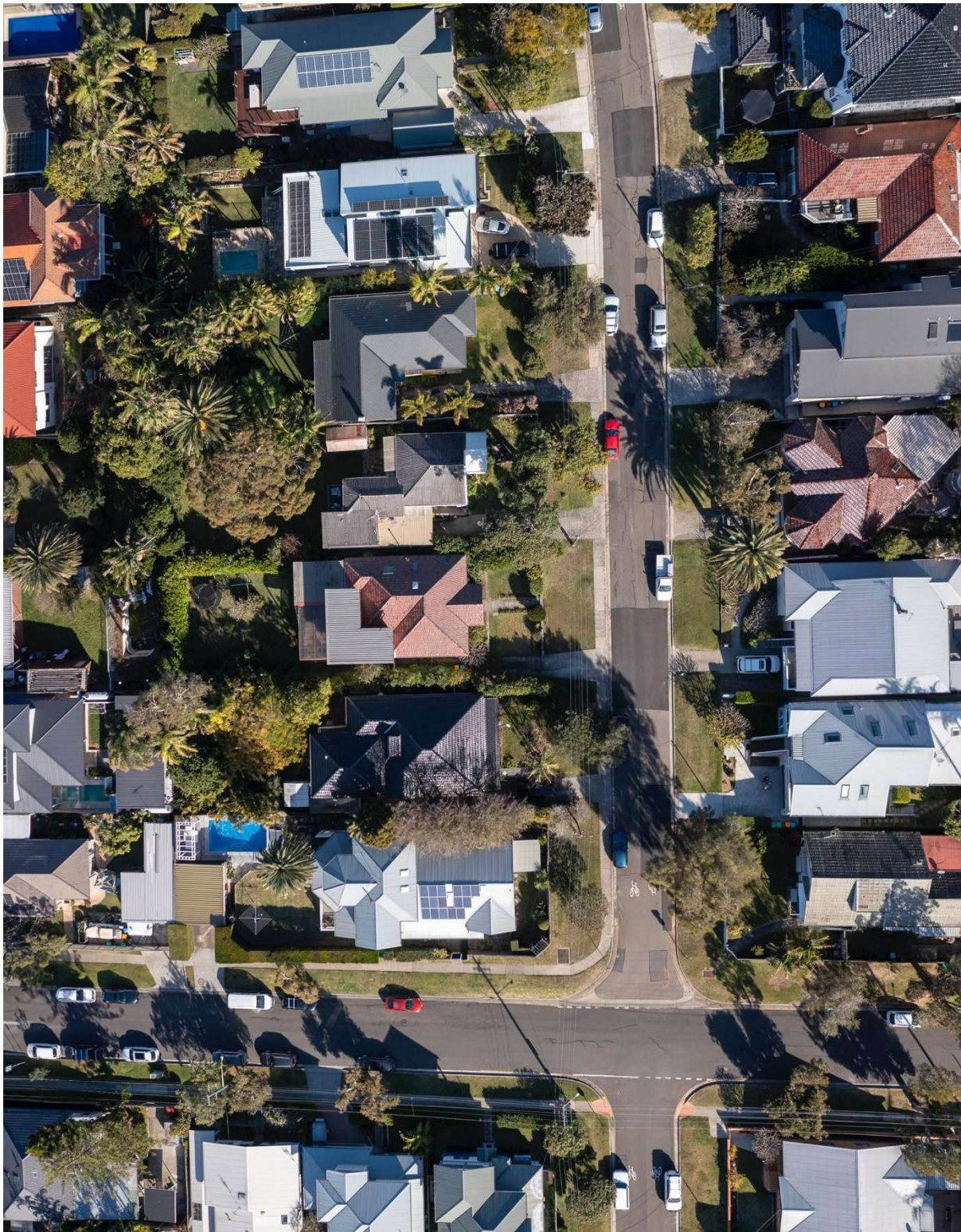
My clients' property shares a common boundary with the subject site.



FIGURES 3 - 6

The subject site (above) and its immediate context, including a range of established 1 – 3 storey dwelling houses.





*Drone Photography. Hay Street is the street running vertical on the photo. Anzac Avenue running across the photo. The subject site is the first four lots. The Hay Street neighbours are very concerned that Hay Street is too narrow and therefore unsuitable to provide safe vehicle access to the major senior's development. Hay Street is also a main bicycle route.*

#### 4. STATUTORY CONTROLS

The following Environmental Planning Instruments and Development Control Plans are relevant to the assessment of this application:

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000
  
- SEPP (Building Sustainability Index: BASIX) 2004;
- SEPP (Resilience and Hazards) 2021;
- SEPP (Biodiversity and Conservation) 2021.
  
- SEPP (Housing) 2021
  
- Warringah Local Environmental Plan (WLEP 2011) [referred to as LEP in this Submission]
- Warringah Local Environmental Plan 2000
- Warringah Development Control Plan 2011 (WDCP 2011) [referred to as DCP in this Submission]

## C. CONTENTIONS THAT THE APPLICATION BE REFUSED

- 1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the following provisions of the State Environmental Planning Policy (Housing) 2021**

Part 5 of SEPP Housing sets out the land use planning and assessment framework for seniors housing in NSW, and is applicable to land in the R2 Low Density Residential zone.

In determining a development application for development for the purposes of in-fill self-care housing, a consent authority must also consider the Seniors Living Policy: Urban Design Guideline for Infill Development, March 2004, published on the Department's website.

I am concerned on the following matters:

### **Division 5 Design Requirements**

#### **97 Design of in-fill self-care housing**

In determining a development application for development for the purposes of in-fill self-care housing, a consent authority must consider the Seniors Living Policy: Urban Design Guideline for Infill Development, March 2004.

Comment: The proposed development does not accord with the Seniors Living Policy: Urban Design Guideline for Infill Development, in terms of neighbourhood amenity and streetscape.

#### **98 Design of seniors housing**

A consent authority must not consent to development for the purposes of seniors housing unless the consent authority is satisfied that the design of the seniors housing demonstrates adequate consideration has been given to the principles set out in Division 6.

Comment: Principles within Division 6 in terms of neighbourhood amenity and streetscape have not been satisfied.

### **Division 6 Design Principles**

#### **99 Neighbourhood amenity and streetscape**

Comment: The design principles in relation to Chapter 99 has not been satisfied:

*(b) recognise the desirable elements of:*



*(i) the location's current character*

*(d) maintain reasonable neighbourhood amenity and appropriate residential character by*

*(i) providing building setbacks to reduce bulk and overshadowing, and*

*(ii) using building form and siting that relates to the site's land form, and*

*(iii) adopting building heights at the street frontage that are compatible in scale with adjacent buildings*

*(e) set back the front building on the site generally in line with the existing building line, and*

*(g) retain, wherever reasonable, significant trees*

### **100 Visual and acoustic privacy**

Comment: The design principles in relation to Chapter 100 has not been satisfied. I refer to these matters later in the Submission.

*Senior's housing should be designed to consider the visual and acoustic privacy of adjacent neighbours and residents by—*

*(a) using appropriate site planning, including considering the location and design of windows and balconies, the use of screening devices and landscaping*

### **101 Solar access and design for climate**

Comment: The design principles in relation to Chapter 101 has not been satisfied. I refer to these matters later in the Submission.

## **Division 7 Non-Discretionary Development Standards**

### **106 Interrelationship of Division with design principles in Division 6**

Nothing in this Division permits the granting of consent to development under this Part if the consent authority is satisfied that the design of the seniors housing does not demonstrate that adequate consideration has been given to the principles set out in Division 6.

Comment: Adequate consideration has not been given to the principles set out in Division 6.

### **108 Nondiscretionary development standards for independent living units—the Act, s 4.15**

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if

complied with, prevent the consent authority from requiring more onerous standards for the matters.

Comment: Adequate consideration has not been given to the principles set out in 108.

(2) The following are non-discretionary development standards in relation to development for the purposes of independent living units—

(c) the density and scale of the buildings when expressed as a **floor space ratio is 0.5:1 or less,**

**Comment: The proposed development exceeds the control by over 50% at 0.75:1.**

The proposed development is not consistent with the building envelope controls established by the DCP, and is certainly not compatible with the scale of any development in the area.

### **FSR**

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the FSR development standard under the SEPP.

The submitted cl 4.6 written request is not well founded as it does not demonstrate that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case or that there are insufficient environmental planning grounds to justify its contravention.

The failure of the submitted cl 4.6 written request to demonstrate the outcomes required by the LEP means that the variation cannot be supported and, therefore, by necessity, the development application should be refused.

The proposal is inconsistent with the objectives of the zone and is inconsistent with the objectives relating to FSR set out in cl. 4.4 of LEP.

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- the development is not compatible with the desired future character of the area in terms of building bulk and scale
- there is no balance between landscaping and built form; the built form dominates the landscape
- the bulk and scale of the development results in adverse effects on adjoining development and the locality.

My clients have reviewed the justification provided in the applicant's 4.6 and submit as follows:

No consideration of urban design, land topography, surrounding building forms, articulation and roof forms have been undertaken to provide for a full understanding of the desired future character.

My clients reiterate their comments about the similar objective for height and additionally state that the FSR proposed does not minimise adverse effects. The proposal seeks setbacks which are insufficient when considered against the provisions

Excavation is not minimised as the carpark required is being built to facilitate the parking, services, storage and other facilities required for a development of the size as proposed which is substantially greater than what is permissible under the FSR standard. The excavation is clearly disproportionate to what would be required for a compliant development.

My clients submit that the Clause 4.6 clearly does not provide the necessary justification and must fail.

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the FSR development standard.

My clients contend that the proposal fails to adequately demonstrate that compliance with each standard is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards. Variation of the development standards is not in the public interest because the proposed development is not consistent with the objectives of each development standard nor the objectives of the zone. The proposed development has not sought adequate variations to development standards. The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

Commissioner Roseth within *Salanitro-Chafei v Ashfield Council* [2005] NSWLEC 366 that the upper level of density that is compatible with the character of dwellings in R2 areas is around 0.5:1.

Proposed development that are in excess of 0.5:1 is one of the explanations why the proposed development appears so "*incongruous in its surrounding*".

My clients contend the proposed development is incongruous in its surrounding.

My clients contend that an assessment of height, bulk and scale under *Veloshin v Randwick Council* [2007] NSWLEC 428 that:

- the impacts are not consistent with the impacts that may be reasonably expected under the controls;
- the proposal's height and bulk do not relate to the height and bulk desired under the relevant controls;

- the area has a predominant existing character and are the planning controls likely to maintain it;
- the proposal does not fit into the existing character of the area;
- the proposal is inconsistent with the bulk and character intended by the planning controls;
- the proposal looks inappropriate in its context
- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact

In terms of the assessment of height, bulk and scale, the non-compliant elements of the proposed development, particularly caused from non-compliant built form, would have most observers finding '*the proposed development offensive, jarring or unsympathetic*'.

The proposal exceeds the threshold considerations for 'low intensity low impact' development as established within *Vigour Master Pty v Warringah Shire Council* [2003] NSWLEC 1128

**2. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the desired future character**

As referred to within the previous section of the submission, the proposal is inconsistent with the desired future character.

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy the aims under the LEP.

- The development compromises amenity impacts on neighbours
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

These matters are also addressed within the SEPP considerations within:

- Division 5 Design Requirements
- Division 6 Design Principles
- Division 7 Non-Discretionary Development Standards

The desired future character of Hay Street and Anzac Avenue is generally considered by height and setback controls on individual lots.

The design outcome does not promote a pavilion type outcome to break the proposed mass over the four sites to respond to the character of Hay Street or Anzac Avenue.

**3. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the 'General Principles of Development Control'. Part 4, Section 40, 52, 61, 62, 63A, 65, 66, 67**

I am concerned that the proposed development does not satisfy 'General Principles of Development Control'. Part 4, Section 40, 52, 61, 62, 63A, 65, 66, 67 and other sections.

- Section 40 Housing for Older People or People with disabilities
- Section 52 Development near parks, bushland reserves & other public spaces – concern is raised of the unacceptable view of a continuous 56.5m long building at 9.5m building height
- Section 61 Views – devastating view loss will occur to neighbours from built form and excessive tree canopy [Refer to later section within this submission]
- Section 62 Access to Sunlight – unacceptable overshadowing to neighbours to the south and east of the subject site [Refer to later section within this submission]
- Section 63A Rear Building Setback – non-complaint to controls
- Section 65 Privacy – overlooking directly into neighbours to the south and east of the subject site [Refer to later section within this submission]
- Section 66 Building Bulk – considerable overdevelopment with FSR at 0.75:1, being 50% greater than SEPP controls, along with non-compliant setbacks and wall heights
- Section 67 Roofs – 57m wide roof structures, do not complement the local skyline.

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the Wall Height control.

The proposed development should be refused due to its excessive height and failure to comply with the Wall Height set out in the controls.

The proposed development is inconsistent with the objectives of the zone and the objectives that underpin the wall height.

This non-compliance, as well as the other non-compliances, arising from the proposed upper level indicates that the proposal cannot satisfactorily achieve the underlying objectives of this control, ultimately resulting in an unacceptable building bulk that creates a severe amenity impact.

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.

- The development does not minimise the adverse effects of the bulk and scale of buildings

### **Wall Height**

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the wall height control.

The failure of the SEE to demonstrate the outcomes required by the wall height control means that the variation cannot be supported and, therefore, by necessity, the development application should be refused.

The proposal is inconsistent with the LEP and DCP as there is a public benefit in maintaining the Wall Height control in this particular case.

The proposed portion of the building above the maximum wall height is not 'minor'.

My clients contend that the proposal fails to adequately demonstrate that compliance with each standard or control is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards. Variation of the development standards or control is not in the public interest because the proposed development is not consistent with the objectives of each development standard or control nor the objectives of the zone. The proposed development has not sought adequate variations to development standards or controls. The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over the landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

The non-compliant elements of the proposed development, particularly caused from non-compliant excessive heights would have most observers finding '*the proposed development offensive, jarring or unsympathetic*'.

### **Setbacks**

The proposed development should be refused as it is significantly non-compliant with setback of the DCP.

- Side
- Front
- Rear
- Side Boundary Envelope

The proposed development does not provide appropriate setbacks. This leads to inconsistency with the character of the area and unreasonable amenity impacts.

The non-compliance fails:

- To reduce amenity impacts on neighbours
- To provide opportunities for deep soil landscape areas.
- To ensure that development does not become visually dominant.
- To ensure that the scale and bulk of buildings is minimised.
- To provide adequate separation between buildings to ensure a reasonable level of privacy, amenity and solar access is maintained.
- To provide reasonable sharing of views to and from public and private properties.

The proposed development results in an encroachment beyond the prescribed building envelope. This non-compliance is indicative of an unacceptable built form and contributes to the severe amenity loss.

The proposal will result in an unsatisfactory scale of built form that will be disproportionate and unsuitable to the dimensions of the site and neighbouring residential development.

The height and bulk of the development will result in unreasonable impacts upon the amenity of neighbouring properties with regard to visual dominance.

The excessive built form of the proposal results in a development where the building mass becomes visually dominant and imposing, particularly when viewed from the visual catchment of neighbouring properties

The cumulative effect of the non-compliances with setback and other development standard result in an over development of the site with the site being not suitable for the scale and bulk of the proposal.

**4. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Schedule 16, Clause 21 Neighbourhood amenity and streetscape (sub-clauses 'a', 'c', 'd', 'e', 'g', 'h') the Warringah Local Environmental Plan 2000.**

I am concerned that the proposed development does not accord with this control:

*(21) Neighbourhood amenity and streetscape*

*The proposed development should—*

*(a) contribute to an attractive residential environment with clear character and identity, and*

*(c) where possible, maintain reasonable neighbour amenity and appropriate residential character by providing building setbacks that progressively increase as wall heights increase to reduce bulk and overshadowing, and*

*(d) where possible, maintain reasonable neighbour amenity and appropriate residential character by using building form and siting that relates to the site's land form, and*

- (e) where possible, maintain reasonable neighbour amenity and appropriate residential character by adopting building heights at the street frontage that are compatible in scale with adjacent development, and
- (g) be designed so that the front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line, and
- (h) embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape.

**5. Pursuant to Section 4.15 (1) (b) and (c) of the Environmental Planning and Assessment Act 1979 the proposed development is unsuitable for the site. In particular the proposal exceeds the threshold considerations for 'low intensity low impact' development as established within Vigour Master Pty v Warringah Shire Council [2003] NSWLEC 1128**

The large, multi-storey development is not considered to be consistent with low intensity development for the locality, and in particular:

- Presents a proposed 56.5m x 34m x 9.5m high, unrelenting, block structure that is an unacceptable response to replace four, modest dwellings in an R2 zone
- The desired future character of the locality will forever change to that which gives the clear impression of a multi-storey apartment building, not only facing suburban streets, but also on view from nearby Griffith Park, and the zones around the beachfront.
- The proposed development is significantly higher than neighbouring dwellings, with non-compliant wall height, setback and density.

**6. Pursuant to Section 4.15 (1) (e) of the Environmental Planning and Assessment Act 1979 the proposed development is not in the public interest. In particular, the proposal does not meet the provisions of the relevant local environmental planning instrument for the creation of a better environment and maintaining the desired future character of the locality.**

The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest. The proposed development will have a detrimental impact on the amenity of adjoining residential properties, and for this reason is contrary to the public interest.



## 7. Impacts Upon Adjoining Properties: Adverse View Loss Impacts

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to achieve an appropriate view sharing outcome to neighbours.

The development application should be refused as it results in unacceptable view loss from adjoining and nearby residential dwellings.

Particulars:

- (a) The proposal is inconsistent with objectives of the DCP regarding views;
- (b) The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;
- (c) The proposal is inconsistent with the height of building development standard under LEP and the maximum wall height and setback controls under the DCP;
- (d) The application documentation has failed to accurately and comprehensively consider and document view loss impacts on affected neighbours;
- (e) Given that the applicant has failed to undertake an actual view impact analysis associated with the individual impacted properties then the proposal is inconsistent with the Land and Environment Court Planning Principle contained in *Tenacity Consulting v Warringah Council* and in particular the "fourth step" regarding the reasonableness of the proposal in circumstances where impacts arise from a development that breaches planning controls; and secondly whether a more skilful design could reduce the impact on views of neighbours.

The development results in a loss of private views enjoyed by the neighbouring properties.

The development does not satisfy the objectives and planning controls of the DCP in respect to view loss.

The development exceeds the maximum quantum of development for the site by contravening development standards and planning controls.

The reduction of private views enjoyed by the neighbouring properties is attributed to the breaches of statutory development standards and planning controls that regulate the building envelope.

The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, design and roof form are not considered to promote or maximise the opportunity of achieving the 'reasonable sharing of views' and some view access to be maintained for neighbours. It is considered that design options do exist, in terms of 'innovative

*design solutions*' to improve the urban environment, including maintaining view access in the area and tapering built form with the sloping topography. The application does not detail whether or which 'skilful' design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in *Tenacity Consulting v Warringah Council* (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a lower roof form, split into pavilions, and substantially reduced at the east, the building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.

Height poles are to be erected and are to be certified by a registered surveyor.

View impact photographs are to be taken from my client's property and public places.

View impact photomontages prepared in accordance with the Land and Environment Court policy on the use of photomontages are to be prepared from the view impact photographs.

I consider that my clients' view loss is greater than moderate. My clients' loss is best defined as severe or devastating.

For proposed developments where there is the potential for view loss from nearby or adjoining properties, consideration must be given to the view sharing principles detailed in the judgement handed down by the NSW Land and Environment Court under *Tenacity Consulting v Warringah Council*.

In relation to principle four of this judgement (being the 'assessment of the reasonableness of the proposal that is causing the impact'), it is considered that a development which complies with all planning controls would be deemed more reasonable than one that is non-compliant. The proposal, as it currently stands, presents numerous non-compliances to the planning controls listed under the LEP and DCP. This brings into question as to whether a more 'skilful' (or sensitive) design would achieve an improved and acceptable outcome, and as such allowing for an acceptable level of view sharing.

In this instance, it must be strongly recommended that the proposed upper floor is redesigned to respond to, and address, principle four of *Tenacity Consulting v Warringah Council*, which would provide the Applicant with a similar amenity while also reducing the view impact to an acceptable level on adjoining properties. An alternative design outcome could be achieved involving a reduction to the internal floor space of the proposed upper level.

In this instance, alternative design outcomes are encouraged to appropriately and satisfactorily address the four-part assessment of *Tenacity Consulting v Warringah Council*.

The proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

The proposed development will result in unacceptable additional view impacts. The view impact is greater than moderate when considered against the *Tenacity* planning principle. The view impact could reasonably be avoided by a more considered design that retains the amenity of the proposal, whilst limiting the impact upon the neighbouring property.

The built form proposed blocks scenic, iconic or highly valued items or whole views as defined in *Tenacity* terms.

The proposed development will unreasonably obstruct views enjoyed by my clients' property from highly used rooms and from entertainment balconies, resulting in inconsistency with the requirements and objectives of the DCP.

The proposed development has not considered the strategic placement of canopy trees to avoid further view loss impacts upon existing view corridors.

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property, and other impacted dwellings, are obstructed under the current proposal. The existing documentation accompanying the application is insufficient to undertake a detailed analysis of the proposal against the relevant DCP and NSWLEC guidelines.

The proposal may also cause potential view loss of the water views from the public road, and may cause potential view loss from other neighbours who have not been notified of this DA.

The SEE has not considered the loss of street view loss from the public domain. The impact on public domain views has not been assessed by the applicant. I refer to *Rose Bay Marina Pty Limited v Woollahra Municipal Council 2013 NSWLEC 1046*. My clients contend that the public domain street view will be completely lost.

I bring to Council's attention a number of recent decisions on view loss grounds:

- *FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208 [NSWLEC Dismissal of Appeal]*
- *DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041 [NSWLEC Dismissal of Appeal]*
- *WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122*
- *REBEL MH NEUTRAL BAY PTY LTD V NORTH SYDNEY COUNCIL [2018] NSWLEC 191*
- *AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013*

I contend that the composite consideration from these NSWLEC decisions, gives clear consideration that where view loss occurs across a side boundary caused by non-compliant development, and the view loss is moderate or higher, then the DA is unreasonable.

Other decisions suggest that even when a compliant development causes view loss, and the view is across a side boundary, and when there is an alternative option open to avoid that view loss, and that alternative has not been taken, then the DA is unreasonable.

FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208

I refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Dee Why on view loss grounds. I refer to Furlong v Northern Beaches Council [2022] NSWLEC 1208. [NBC DA 2021/0571, 55 Wheeler Parade Dee Why]

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.

I raise the dismissal by NSWLEC of the Applicant's appeal. The case in question had many similarities to this DA.

NBC DDP refused this DA on 24 November 2021, with Panel members Rod Piggott, Rebecca Englund, Tony Collier and Liza Cordoba, following a Refusal Recommendation of NBC Development Assessment Manager, by the NBC Responsible Officer Jordan Davies, a very senior NBC Planning Officer, that Council as the consent authority refuses Development Consent to DA2021/0517 for Alterations and additions to a dwelling house on land at Lot B DP 338618, 55 Wheeler Parade Dee Why subject to the conditions that were outlined in the Assessment Report.

The assessment of DA 2020/0517 involved a consideration of a view loss arising from a proposed development that presented a generally compliant envelope to LEP and DCP controls.

The DDP agreed with the recommendation and refused this DA.

The Assessment Report found that:

*" A view assessment is undertaken later in this assessment report and the proposal is found to result in an unsatisfactory view sharing outcome and the application is recommended for refusal for this reason"*

The Assessment Report found that in respect to a compliant envelope:

*" the question to be answered is whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact upon views of neighbours."*

The Assessment Report within the Tenacity Assessment concluded:

*"the view impact looking south-east is considered both severe and devastating from the respective rooms given the significant proportion of the views which are impacted. The aspect looking south and south- east are considered whole, prominent coastal views which are certainly worthy of consideration and at least partial protection. The proposal to remove the vast majority of these views is considered overall to be a severe view impact."*

The DA was recommended for refusal, and DDP refused the DA in full support of the NBC Responsible Officer's Assessment Report.

The severity of the view loss that was considered unacceptable by the DDP was clearly stated by the DDP. This level of view loss was considered as 'severe' by the assessing officers and the DDP.

The Applicant appealed this decision.

On 22 April 2022, the appeal on *Furlong v Northern Beaches Council* [2022] NSWLEC 1208, was dismissed by the NSWLEC Commissioner Dr Peter Walsh. The decision summarised the issues:

60 Council took me to the findings of Robson J in *Wenli Wang v North Sydney Council* [2018] NSWLEC 122 ('Wenli Wang').

I reproduce pars [70]-[71] below:

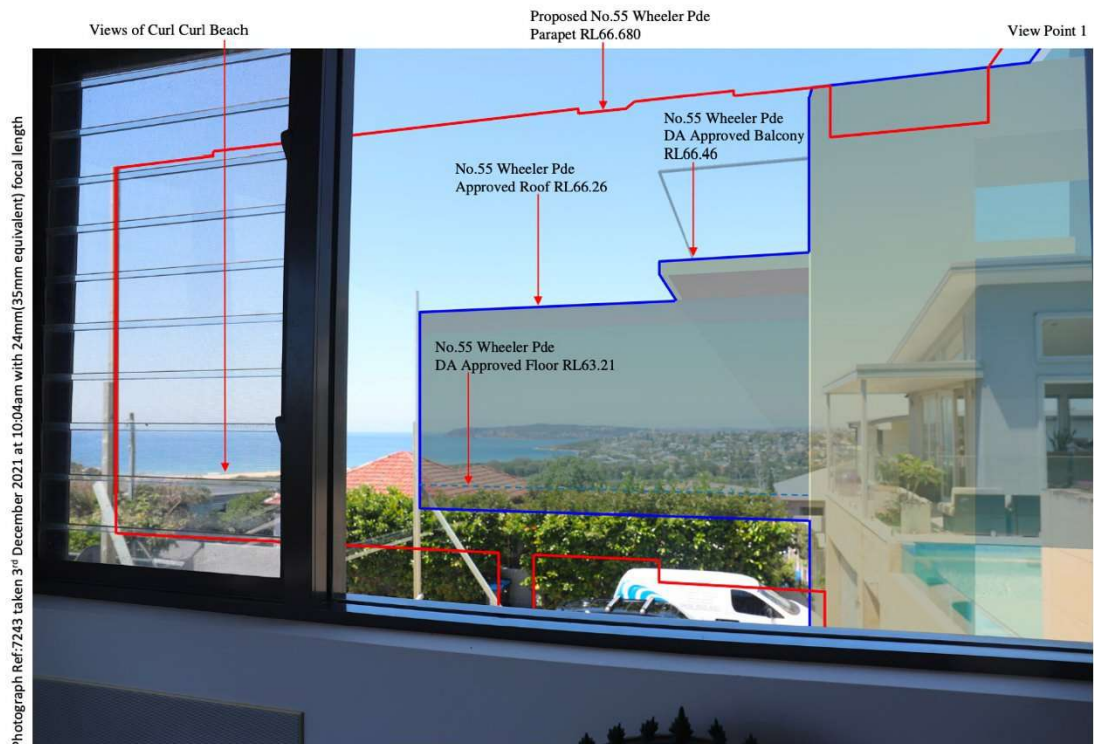
*"70 Applying the fourth step of Tenacity, I repeat that the proposed development complies with the development standards in the LEP and is therefore more reasonable than a development which would have breached them. However, I do also note that there is evidence in the form of the Colville plan that a similar amount of floor space could be provided by a design which reduces the effect on the view from the surrounding properties.*

*71 I consider there is force in the submission of Council that the applicant has taken a circular approach to the fourth step of Tenacity which presupposes a right to the level of amenity achieved by the proposed development. Whilst it is true that a redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views."*

*61 In the matter before me, I am more inclined to the kind of conclusion expressed at [71] in Wenli Wang. While the proposed development, accommodating the alternative designs suggested by Council (either shifting the master bedroom westwards some 3.5m or sliding the master bedroom to the south to bring about the same view availability effect – see [43]), may not provide the same amenity outcomes as would be the case without such changes, the proposal would still enjoy a very high level of amenity, including in regard to the panoramic views available to the south, especially from living areas. The master bedroom would still enjoy superior views.*

*62 The proposal would bring about a severe view loss impact on 51A Wheeler Parade when there are reasonable design alternatives which would moderate this impact significantly. The proposal does not pay sufficient regard to cl D7 of WDCP which requires view sharing. The proposal before the Court does warrant the grant of consent in the circumstances.*

The key issues in this case considered that the proposal would bring about a greater than moderate view loss impact, across a side boundary, on a Study/Bedroom when there was a reasonable design alternative which would moderate this impact significantly. The proposal did not pay sufficient regard to cl D7 of WDCP which requires view sharing.



Photomontage by Pam Walls  
Based on Survey Plus Survey#17703F:13/5/2021  
Studio JLA DA Drawings#0328G:26/3/2021

3D computer model of DA Approved No.55 as 50% transparency  
View from No.51A Wheeler Pde Study  
Objection to No.55 Wheeler Pde, Dee Why, NSW

### The NSWLEC Furlong View Loss

In light of the guidance given in Tenacity, side boundary views have been considered difficult to protect for homeowners who will suffer from view loss from a proposed development.

However, the decision by Commissioner Walsh in *NSWLEC Furlong* has clarified the following:

1. although the decision in Tenacity makes it so that views across side boundaries are more difficult to protect than front and rear boundary views, that “does not mean the protection of views across side boundaries is not appropriate in some circumstances”; and
2. the proper application of the decision in Tenacity requires that “the extent of view loss impact should be assessed from the property as a whole”.

Furlong has therefore extended the reach of the second step set out in Tenacity in circumstances where a proposed development would bring about moderate, severe or devastating view loss to side boundary views.

In Furlong, ‘severe view loss’ was taken to occur when a proposed development would block views that are of a ‘high value’ and not replicated in other areas of the property, even if those view were perceived from the side boundaries of a property.

The key-takeaway from this decision is that views that are not perceived from the front and rear boundaries of a property can still be protected if they are of ‘high

*value*' and not replicated in other areas of the property. In such circumstances, the loss of 'high value' views could be considered to cause severe view loss and may be able to be protected.

I contend that the decision in *Furlong* refines the steps in *Tenacity* and gives stronger protection to neighbouring properties who might suffer from view loss.

Further, a design alternative which reduces the view loss is more likely to be accepted. This goes to the reasonableness of a proposal under the fourth step in *Tenacity*.

Since *Tenacity*, side boundary views were considered difficult to protect for home owners who will suffer from view loss from a proposed development.

However, *Furlong* suggests that for side boundary views which are of a high value and not replicated in other areas of the property, it is appropriate to protect those views and refuse the proposed development. In this way, *Furlong* refines the planning principle in relation to view loss by placing greater emphasis on the perceived value of the view.

#### DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041

My clients refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Curl Curl on view loss grounds. My clients refer to *Der Sarkissian v Northern Beaches Council [2021] NSWLEC 1041*. [NBC DA 2019/0380, 72 Carrington Parade, Curl Curl]

I raise the dismissal by NSWLEC of the Applicant's appeal. The case in question had many similarities to this DA.

- The main view loss concern was to a neighbour immediately behind 72 Carrington Parade, Curl Curl. My clients are in a similar position immediately behind the subject site.
- The view loss involved side setback controls.
- The view loss at Curl Curl was severe – my clients' loss would be also be greater than moderate: my clients would have significant loss of land/water interface from my clients' living spaces

The key matters within the Commissioner's Conclusion:

- the determinative issue in this case is view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- both policy controls and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieves too much on a constrained site.
- a reasonable development at the upper level in regard to view sharing and setback policy,
- with good design, there is scope for this to occur while also providing for reasonable floor space on this level.

It is clear that the view loss, on this DA, occurs through a poor consideration on wall height, building height and side boundary envelope controls.

My commentary on this DA is very similar to Commissioner Walsh in *Der Sarkissian v Northern Beaches Council* [2021] NSWLEC 1041

- the determining issue in this case is view loss – in my clients' case a water and water/land interface view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- policy controls of building height, wall height, side boundary envelope non-compliances and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieves too much on a constrained site.
- a reasonable development at the upper level in regard to view sharing building height, wall height, side boundary envelope policy, would share the view
- with good design, there is scope for view sharing to occur while also providing for reasonable floor space on all levels

My clients contend that there is no reasonable sharing of views amongst dwellings.

The new development is not designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

The proposal has not demonstrated that view sharing is achieved through the application of the Land and Environment Court's planning principles for view sharing.

WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122

This decision, referenced in *FURLONG*, gives consideration to the assessment of a complaint development.

In this particular case, Council is assessing a substantially non-compliant development, however view loss over a side boundary again is a key matter,

REBEL MH NEUTRAL BAY PTY LTD V NORTH SYDNEY COUNCIL [2018] NSWLEC 191

As noted by his Honour, Justice Moore of the Court in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 (*Rebel*),

*“the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as “sharing” for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view”.*

This is a key consideration, and one that parallels the forementioned NSWLEC decisions.



## AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013

As noted by Commissioner Espinosa of the Court in *Ahearne v Mosman Municipal Council* [2023] NSWLEC 1013 that the view sharing objectives and controls were minimised through the appropriate distribution of floor space and landscaping.

The importance of this decision reinforces the issues of landscaping in view loss assessment, and the consideration that the composite outcome of appropriate distribution of floor space and landscaping is relevant to view sharing principles.

### NBC RECENT REFUSALS ON VIEW LOSS

I raise refusals by NBC DDP and NBLPP in 2022 and 2023, on view loss grounds:

- NBLPP REFUSAL: DA 2021/1408 16 ADDISON ROAD MANLY
- NBC DDP REFUSAL: DA 2021/1734; 21 HEADLAND ROAD NORTH CURL CURL.
- NBLPP REFUSAL: DA 2022/0625 27 KARLOO PARADE NEWPORT
- NBLPP REFUSAL: DA 2022/1158 13 ILUKA ROAD, PALM BEACH
- NBLPP REFUSAL: DA 2022/1650 8 BAROONA ROAD CHURCH POINT
- NBC DDP REFUSAL: Mod 2022/0518 26 RALSTON ROAD PALM BEACH

### NBLPP REFUSAL: DA2021/1408 16 ADDISON ROAD MANLY

On 16 March 2022, NBLPP refused DA2021/1408 at 16 Addison Road Manly, accepting the Assessment Report of NBC Officer Maxwell Duncan. NBLPP Members were Crofts, Sainsbury, Krason and Cotton. The DA was refused as the proposed development was inconsistent with the provisions of Clause 3.4.3 Maintenance of Views of the Manly Development Control Plan.

The view loss was across side boundaries.

#### *Comment to Principle 4:*

*The proposed development complies with the Building Height and Floor Space Ratio development standards under the Manly LEP. The subject development does not comply with the controls of the MDCP 2013 and, in the circumstance, it is found that the view loss for the neighbouring property is unacceptable and warrants the refusal of the application. The demonstrated non-compliances, being side setbacks and wall height give rise to unreasonable view impacts. It is acknowledged that the context and siting of the existing dwelling on the subject site, makes views for adjoining properties extremely vulnerable to any form of new development. However, it is concluded that the extent of the breaches of the planning controls is excessive and a more skilful and compliant design would vastly improve the outcome. The question of a more skilful design has been considered in that a close*

analysis of the plans identifies the opportunity to retain areas of view lines from all affected properties. The views assessment determined that there is the opportunity to significantly lessen the impact on views. While it acknowledged that full compliance would be unreasonable given the constraints of the site, a greater level of compliance with both the wall height and side setback control would allow for view corridors to be maintained. In this regard, the development potential would not be significantly compromised. Therefore, the proposed dwelling house in particular the first-floor setback and wall height non-compliance is considered unreasonable in the circumstances of this application in that the application does not demonstrate a reasonable sharing of views.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the minor non-compliance to the side setbacks and wall height contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB and FSR, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBC DDP REFUSAL: DA 2021/1734; 21 HEADLAND ROAD NORTH CURL CURL.

On 14 September 2022, NBC DDP refused DA 2021 1734 at 21 Headland Road North Curl Curl. Officer Richter [Independent Planning Consultant] recommended refusal on view loss grounds. The Panel Members were Adam Richardson, Anne-Maree Newbery and Neil Cocks.

The proposed development was compliant to HOB at 8.16m, with a modest non-compliance to Side Boundary Envelope.

The view loss was a modest triangular ocean south towards Manly, across a front and rear boundary.

The view loss however was devastating – a complete loss.

The DDP Refusal noted the following:

*'The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, design and roof form are not considered to promote or maximise the opportunity of achieving the 'reasonable sharing of views' and some view access to be maintained for the first floor areas of No. 20 Headland Road. It is considered that design options may exist, in terms of 'innovative design solutions' to improve the urban environment (including maintaining view access in the area and tapering built form with the sloping topography). The application does not detail whether or which 'skilful' design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in Tenacity Consulting v Warringah Council (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a flatter roof form, the*

*building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.'*

In general terms, NBC DDP assessed that the proposed development was unreasonable, in that the minor non-compliance to side boundary envelope and minor non-compliance to wall height contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB, NBC DDP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

#### NBLPP REFUSAL: DA2022/0625 27 KARLOO PARADE NEWPORT

On 7 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer, Steven Findlay. NBLPP Members were Biscoe, Esposito, Brown and Simmons.

The view loss was severe.

The view in question was a partial view, across a side boundary to the headland view in Newport.

The loss was predominantly caused by a non-compliant HOB, Landscape Area, Side Boundary Envelope, and Setback controls.

The assessment read:

*The view impacts are almost entirely caused by non-compliances which, independently when measured against the respective Outcomes in the P21DCP and PLEP. In response to Principle 4 - the design of the building is unreasonable and it is a non-compliance that is causing the view impacts. The site has ample opportunity to accommodate an alternate, more skilful design, which retains more views. The development is therefore inconsistent with the View Sharing Planning Principle of Tenacity Consulting Pty Ltd Vs Warringah Council (2004) NSWLEC 140.*

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the loss was predominantly caused by a non-compliant HOB, Landscape Area, Side Boundary Envelope, and Setback controls.

#### NBLPP REFUSAL: DA 2022/1158 13 ILUKA ROAD, PALM BEACH

On 14 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer Peter Robinson. NBLPP Members were Biscoe, Krason, Hussey and Bush.

The view in question was a partial view, across a side and secondary street boundary, across a reserve to the water view in Pittwater. The Assessment Report considered that 50% of the water view would be lost, and considered it a moderate loss. The loss was predominantly caused by a non-compliant secondary front building line. Although the proposed development was compliant to HOB, and most other envelope controls, it was the non-compliant secondary front building line that caused the moderate view loss that was considered unreasonable.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the minor non-compliance to the secondary front building line contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

#### NBLPP REFUSAL: DA 2022/1650 8 BAROONA ROAD CHURCH POINT

On 5 April 2023, NBLPP refused DA 2022/1650 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer Stephanie Gelder. NBLPP Members were Tuor, Kirk, Hussey and Graham.

The Assessment Report stated:

*The reasonableness of the proposal that is causing the impact is considered to be inappropriate in this instance. The proposal presents variations to the Built Form Controls, including the Landscaped Area that demonstrates the proposed development is an over-development of the subject site, as it reduces the total landscaped area as a result of additional built form. The view impact for the rear addition to the existing dwelling house is considered to be unreasonable, and it is considered a more skilful design could be explored to reduce the impact to No.10 Baroona Road, although it is noted that the site has almost reached its highest and best use. In summary, the proposed development presents a significant view loss impact, that is unacceptable, and therefore unsupportable. The proposed development does not satisfy this outcome.*

The view in question was a whole view, across a side boundary, to the water view in Pittwater. The Assessment Report considered that the loss would be severe. The proposed built form in this location was generally compliant to envelope controls.

In general terms, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

#### NBC DDP REFUSAL: Mod 2022/0518 26 RALSTON ROAD PALM BEACH

On 28 June 2023, NBC DDP refused Mod DA 2022/0518 on view loss grounds, across a rear and front boundary.

The DDP Panel members were Daniel Milliken, Rod Piggott and Kelly Lynch.

The applicant in this case was requesting an increase in building heights, over the previously approved height that allowed for a reasonable sharing of views.

The assessment had concluded the views from openings to the north facing living room on the second storey to the southern neighbour would be adversely affected by the proposed building height increase. This includes obstruction of the Broken Bay water view, and degrading the land/water interface view which is currently enjoyed from the living area. This outcome fails to comply with Part C1.3 of the P21 DCP and formed the main reason for refusal of the application.

In general terms, although the proposed additional height fell under HOB standards, the severe loss of view was unreasonable considering there was other 'more skilful design' solutions to increasing storey heights, such as benching the built form into the hillside.

#### TENACITY CONSULTING V WARRINGAH COUNCIL 2004

In Tenacity, [Tenacity Consulting v Warringah Council 2004], NSW LEC considered Views. Tenacity suggest that Council should consider:

*"A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable."*

The development breaches multiple planning controls and is unreasonable.

My clients contend that the impact on views arises as a result of non-compliance with one or more planning controls, and the view loss from the highly used rooms and decks is considered unreasonable.

#### APPLICATION OF TENACITY PLANNING PRINCIPLE

I have been unable to consider the impact of the proposal on the outward private domain views from my clients' property.

Height poles and montage view loss analysis has yet to be provided by the Applicant.

An assessment in relation to the planning principle of Roseth SC of the Land and Environment Court of New South Wales in Tenacity Consulting v Warringah [2004] NSWLEC 140 - Principles of view sharing: the impact on neighbours (Tenacity) is made, on a provisional basis ahead of height poles being erected by the Applicant.

The steps in Tenacity are sequential and conditional in some cases, meaning that proceeding to further steps may not be required if the conditions for satisfying the preceding threshold is not met.

## STEP 1 VIEWS TO BE AFFECTED

The first step quoted from the judgement in *Tenacity* is as follows:

*The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

An arc of view is available when standing at a central location in the highly used zones including entertainment decks, highly used rooms, and private open spaces on my clients' property.

The proposed development will impact upon expansive water views, and water views in which the interface between land and water is visible. The views include whole views.

The composition of the arc is constrained over the subject site boundaries, by built forms and landscape. The central part of the composition includes the subject site. Views include scenic and valued features as defined in *Tenacity*. The proposed development will take away views for its own benefit. The view is from my clients' highly used rooms towards the view. The extent of view loss exceeds moderate and the features lost are considered to be valued as identified in Step 1 of *Tenacity*.

## STEP 2: FROM WHERE ARE VIEWS AVAILABLE

This step considers from where the affected views are available in relation to the orientation of the building to its land and to the view in question. The second step, quoted, is as follows:

*The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

The views in all cases are available across the boundary of the subject site, from standing and seated positions. An arc of view is available when standing at highly used zones on my clients' property.

In this respect, I make two points: My clients have no readily obtainable mechanism to reinstate the impacted views from my clients' high used zones if the development as proposed proceeds; and all of the properties in the locality rely on views over adjacent buildings for their outlook, aspect and views.

**PETER EASTWAY, 32 HAY STREET, COLLAROY  
DEVASTATING VIEW LOSS**



Extent of Loss: Total loss of ocean view from viewpoint

**PAUL OUDHOF & DEIDRE McALINDEN, 34 HAY STREET, COLLAROY  
DEVASTATING VIEW LOSS**



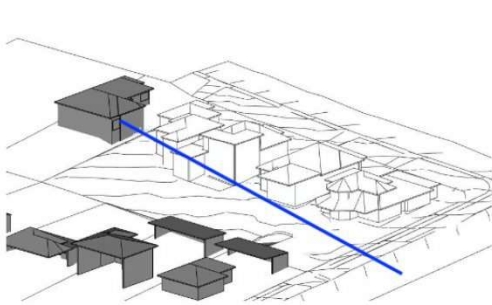
Extent of Loss: Total loss of ocean view from viewpoint



**LES & MARIE RANDOLPH, 35 HAY STREET, COLLAROY  
DEVASTATING VIEW LOSS**



Extent of Loss: Total loss of ocean view from viewpoint



## IMPACT ON PUBLIC DOMAIN VIEWS

### DEVASTATING VIEW LOSS

The applicant has not considered the loss of street view loss from the public domain. The impact on public domain views has not been assessed by the applicant. I refer to *Rose Bay Marina Pty Limited v Woollahra Municipal Council* 2013 NSWLEC 1046. My clients contend that the public domain street view will be completely lost.



Extent of Loss: Total loss of ocean view from viewpoint

### STEP 3: EXTENT OF IMPACT

The next step in the principle is to assess the extent of impact and the locations from which the view loss occurs.

Step 3 as quoted is:

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

As I rate the extent of view loss is above moderate in my opinion the threshold to proceed to Step 4 of Tenacity is met.

### STEP 4: REASONABLENESS

The planning principle states that consideration should be given to the causes of the visual impact and whether they are reasonable in the circumstances.

Step 4 is quoted below:

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

NSWLEC Commissioner Walsh in *Balestriere v Council of the City of Ryde* [2021] NSWLEC 1600 in relation to the Fourth Step:

*There are three different points to the fourth Tenacity step, concerned with assessing the reasonableness of the impact, which I summarise as follows:*

*Point 1 - Compliance, or otherwise, with planning controls.*

*Point 2 - If there is a non-compliance, then even a moderate impact may be considered unreasonable.*

*Point 3 - For complying proposals: (a) "whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact", and (b) "if the answer to*

*that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable”.*

*In respect to Point 3, NSWLEC Commissioner Walsh in Furlong v Northern Beaches Council [2022] NSWLEC 1208 referenced Wenli Wang v North Sydney Council [2018] NSWLEC 122, in considering that if a more skilful design could be achieved arriving at an outcome that achieved 'a very high level of amenity and enjoy impressive views', then a proposed development has gone too far, and must be refused.*

As the proposed development does not comply with outcomes and controls, that are the most relevant to visual impacts, greater weight would be attributed to the effects caused.

In my opinion the extent of view loss considered to be the greater than moderate, in relation to the views from my clients' highly used zones of my clients' dwelling. The view is from a location from which it would be reasonable to expect that the existing view, particularly of the view that could be retained especially in the context of a development that does not comply with outcomes and controls. The private domain visual catchment is an arc from which views will be affected as a result of the construction of the proposed development. The proposed development will create view loss in relation to my clients' property. The views most affected are from my clients' highly used zones and include very high scenic and highly valued features as defined in Tenacity. Having applied the tests in the Tenacity planning principle I conclude that my clients would be exposed to a loss greater than moderate from the highly used rooms. The non-compliance with planning outcomes and controls of the proposed development will contribute to this loss. Having considered the visual effects of the proposed development envelope, the extent of view loss caused would be unreasonable and unacceptable.

The proposed development cannot be supported on visual impacts grounds. The proposal incorporates a significant departure from controls, which helps contain building envelope. Additionally, the siting of the proposed development and its distribution of bulk does not assist in achieving view sharing objectives. Where the diminishing of private views can be attributed to a non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. My assessment finds that view sharing objectives have not been satisfied.

The above non-compliance will give rise to unreasonable amenity impacts upon the adjoining properties. In this instance, the proposal is not considered to achieve compliance with this control.

There are architectural solutions that maintains my clients' view. I identify the precise amendments necessary to overcome this loss.

As noted by his Honour, Justice Moore of the Court in Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 (Rebel),

*“the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development.*

*This cannot be regarded as “sharing” for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view”.*

The same unreasonable scenario in Rebel applies to the current DA. The proposed breaching dwelling will take away views from my clients' property (and possibly other adjoining properties) to the considerable benefit of the future occupants of the proposed dwelling. This scenario is not consistent with the principle of View Sharing enunciated by his Honour, Justice Moore in Rebel. The adverse View Loss from my clients' property is one of the negative environmental consequences of the proposed development. The proposed development cannot be supported on visual impacts grounds.

These issues warrant refusal of the DA.

My clients ask Council to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

In conclusion, as the dwelling proposed will impact views from my clients' property, the erection of height poles is required to allow an accurate assessment of view impact. The height poles should provide a delineation to identify any elements of the proposed built form that breaches the envelope controls of height and setbacks.

My clients contend that the proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

My clients contend that the proposal is contrary to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* in that it does not satisfy the view sharing controls of the DCP.

### **8. Impacts Upon Adjoining Properties: View Loss Caused by Poor Strategic Positioning of Tree Canopy**

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to strategically locate new tree canopy to avoid amenity loss.

My clients are concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view.

There are 13 Trees proposed that are over the 7.2m Wall Height Controls. We ask for all trees over 7.2m to be deleted from the Landscape Plan and replaced by lower height species.

All plants in the viewing corridors of neighbours must be reduced to 3m or lower to protect the view.

#### SCHEDULE OF PLANT MATERIAL

CODE	BOTANICAL NAME	COMMON NAME	QUANTITY	MATURE HEIGHT	CONTAINER SIZE	STAKES								
AAm	<i>Acmena smithii</i> 'Ailyn Magic'	Dwarf Lilli Pilli	32	1m	200mm	-	HS	<i>Hibbertia scandens</i> *	Guinea Flower	20	0.4m	140mm	-	
ACu	<i>Archontophoenix cunninghamiana</i>	Bangalow Palm	10	13m	75 litre	2	LJr	<i>Liriodendron just right</i>	Turf Lily	94	0.4m	140mm	-	
AC	<i>Angophora costata</i> *	Sydney Red Gum	2	25m	75 litre	2	LI	<i>Lagerstroemia indica</i> 'Sioux'	Crape Myrtle	7	4m	100 litre	2	
AN	<i>Asplenium nidus</i> *	Birds Nest Fern	15	1m	300mm	-	LLS	<i>Lomandra longifolia</i> 'Tanika'	Tanika Lomandra	50	0.4m	140mm	-	
APs	<i>Acer palmatum</i> 'Serikaki'	Coral Barked Maple	2	4m	100 litre	2	MP	<i>Myoporum parvifolium</i> *	Seascape Lomandra	104	0.4m	140mm	-	
AS	<i>Acmena smithii</i> *	Lilli Pilli	1	12m	75 litre	2	PTbb	<i>Phormium tenax</i> 'Bronze Baby'	Creeping Boobialla	12	0.1m	140mm	-	
ASm	<i>Acmena smithii</i> 'Minor'	Dwarf Lilli Pilli	53	3m	200mm	-	PTmm	<i>Pittosporum tobira</i> 'Miss Muffet'	Dwarf NZ Flax	29	1m	200mm	-	
BM	<i>Backhousia myrtifolia</i> *	Grey Myrtle	2	7m	75 litre	2	PX	<i>Philodendron 'Xanadu'</i>	Miss Muffet Tobira	13	1.5m	200mm	-	
BN	<i>Blechnum nudum</i> *	Fish Bone Water Fern	45	0.4m	140mm	-	RE	<i>Raphis excelsa</i>	Xanadu	10	0.75m	200mm	-	
BS	<i>Banksia serrata</i> *	Old Man Banksia	3	7m	75 litre	2	RI	<i>Rhaphiopsis indica</i>	Lady Palm	6	2.5m	300mm	-	
CAI	<i>Correa alba</i> *	White Correa	14	1.5m	200mm	-	SAe	<i>Syzygium australe</i> 'Elegance'	Indian Hawthorn	27	1.5m	200mm	-	
CBJ	<i>Callistemon 'Better John'</i>	Bottlebrush	10	1.2m	200mm	-	SAp	<i>Syzygium australe</i> 'Pinnacle'	Dwarf Lilli Pilli	8	1.5m	200mm	-	
CGJ	<i>Callistemon 'Green John'</i>	Bottlebrush	13	0.6m	200mm	-	SC	<i>Syzygium 'Cascade'</i> *	Cascade Lilli Pilli	21	2m	300mm	-	
CR	<i>Correa reflexa</i> *	Native Fuchsia	13	1m	200mm	-	SS	<i>Senecio serpens</i>	Blue Chalk Sticks	16	0.3m	200mm	-	
DCij	<i>Dianella caerulea</i> 'Little Jess'	Little Jess Dianella	32	0.4m	140mm	-	SSn	<i>Syzygium 'Straight and Narrow'</i>	Lilli Pilli	29	5m	200mm	-	
DB	<i>Dianella 'Breeze'</i> *	Dianella Breeze	158	0.6m	140mm	-	STI	<i>Syzygium 'Tiny Trev'</i>	Dwarf Lilli Pilli	24	0.6m	200mm	-	
DE	<i>Doryanthes excelsa</i> *	Gymea Lily	9	2m	300mm	-	TL	<i>Tristanopsis laurina</i> 'Luscious'	Water Gum	3	5m	75 litre	2	
DRe	<i>Dichondra repens</i> *	Kidney Weed	20	0.4m	140mm	-	VH	<i>Viola hederacea</i> *	Native Violet	48	0.1m	140mm	-	
DRir	<i>Dianella revoluta</i> 'Little Rev'	Little Rev Dianella	71	0.3m	140mm	-	VO	<i>Viburnum odoratissimum</i>	Sweet Viburnum	22	2.5m	200mm	-	
ER	<i>Elaeocarpus reticulatus</i> *	Blueberry Ash	4	6m	75 litre	2	WAb	<i>Westringia fruticosa</i> 'Aussie Box'	Dwarf Coastal Rosemary	29	1m	200mm	-	
							WFr	<i>Westringia fruticosa</i> *	Coastal Rosemary	7	2m	200mm	-	
							WFm	<i>Westringia fruticosa</i> 'Mundi'	Coastal Rosemary	9	0.5m	200mm	-	

\* indicated native plant species.

At the recent NSWLEC case, *Hong v Mosman Municipal Council [2023] NSWLEC 1149* decision dated 31 March 2023, view loss caused by excessive landscape was a key issue. Commissioner Walsh summarised the matter in cl 30 of his decision:

*In regard to landscaping and tree protection, I note again that in Court and to some degree of detail, I worked through with the experts the various points of concern raised. This resulted in a number of further agreed alterations to the landscape plan. The Revision C drawings, based on the evidence of the experts but also in my own reading, now provide that appropriate balance between retaining and sometimes enhancing Middle Harbour views, while also providing for a valuable local landscape contribution.*

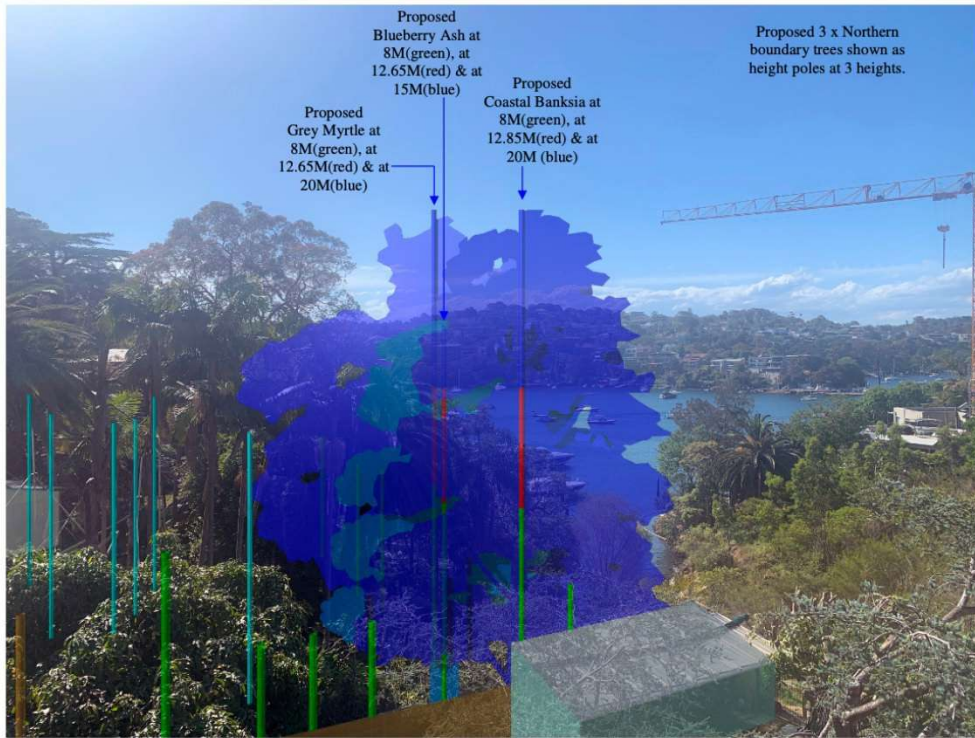
The Revision C drawings required 9 high canopy trees to be deleted and replaced by 3m high species. The condition of consent required a further four transplanted palms to be deleted from the Landscape Plans.

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.

I add the montage prepared to support the neighbour's submission in these respects.

Photograph Ref:7253-taken 13 Dec 2022 at 11:19am with 35mm focal length



Photomontage by Pam Walls  
Based on S.J.Surveying Services Height Pole Sketch#247319:24/10/2022  
Selena Hanna Landscape Drawings#LP03-B:22/02/2022

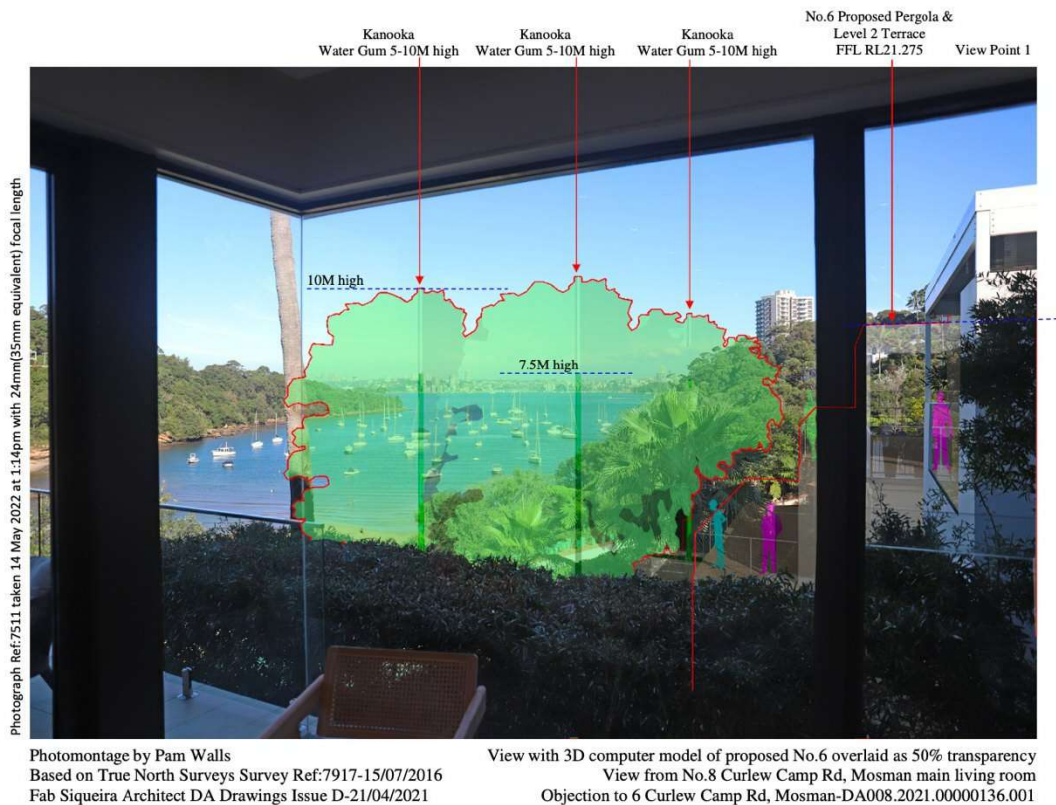
Proposed 3 x boundary trees shown as 50% transparency  
View from No.12 main living balcony  
Objection to 10 Julian St, Mosman

*Hong v Mosman Municipal Council [2023] NSWLEC 1149  
View Loss caused by excessive landscape in the harbour viewing corridor zone*

At the recent NSWLEC case, *Zubani v Mosman Municipal Council [2022] NSWLEC 1381*, decision dated 19 July 2022, clearly identifies that under *Tenacity*, Council must be mindful to restrict landscape heights to ensure views are adequately protected. Commissioner Morris referred to the matter in 47 and 49.

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.



### *Zubani v Mosman Municipal Council [2022] NSWLEC 1381* View Loss caused by excessive landscape in the street setback zone

At the recent NSWLEC case, *Petesic v Northern Beaches Council [2022] NSWLEC*, decision dated 30 May 2022, view loss caused by excessive landscape was a key issue. Northern Beaches Council's SOFAC filed 16 September 2021, prepared by Louise Kerr, Director Planning and Place at NBC, in B2 Item 7, called for 'strategic positioning of canopy trees' to avoid view loss. Proposed Trees were lowered and repositioned as a result. Commissioner Chilcott referred to the matter in 49[5].

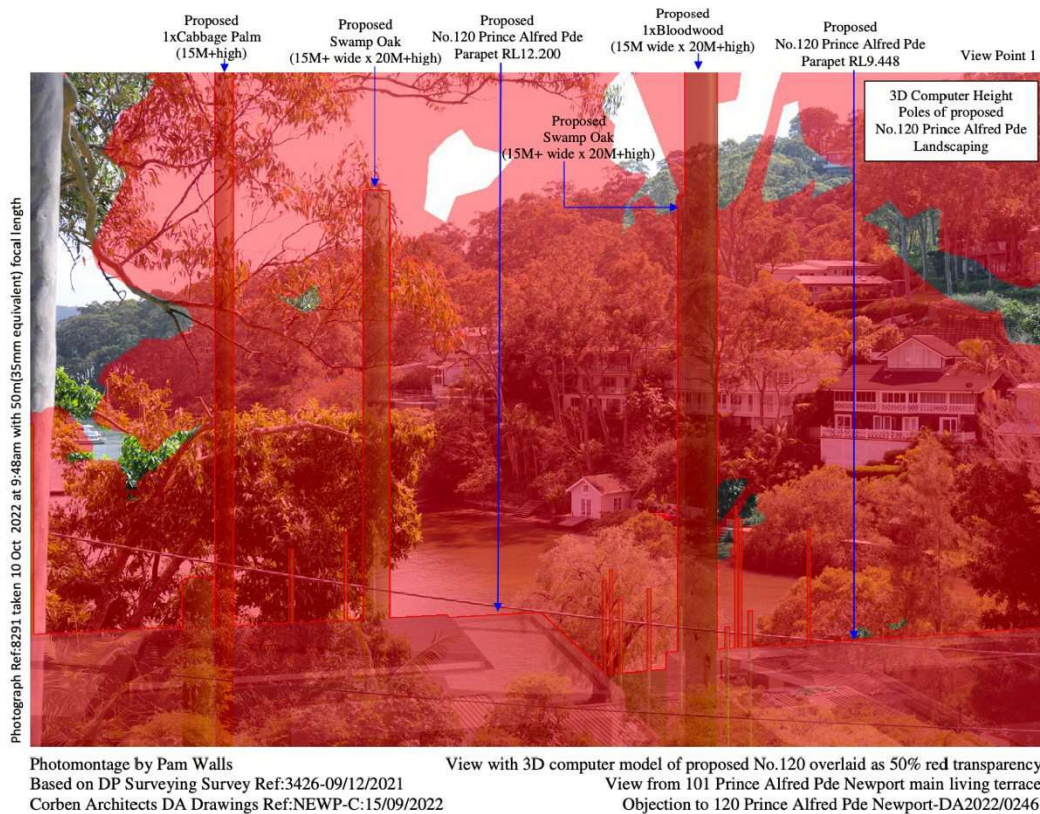
At the recent NBLPP decision, DA 2022 0246 at 120 Prince Alfred Parade, Newport on 8 December 2022, the Panel agreed to delete trees higher than 8.5m in the viewing corridor as recommended by Council's assessment Report, and imposed the



additional condition that the trees "shall be maintained so that they do not exceed 8.5 metres in height measured from the ground at the base of the tree"

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.



NBLPP: DA 2022 0246 120 Prince Alfred Parade, Newport on 8 December 2022  
View Loss caused by excessive landscape

At the recent NBC DDP decision, DA 2022 2280 at 47 Beatty Street Balgowlah in July 2023, the Panel agreed to delete trees higher than 6.0m in the viewing corridor as recommended by Council's Assessment Report, and imposed the additional condition that the trees:

"...shall be replaced with a species with a maximum mature height of 6m."

The Panel also deleted a roof terrace that obstructed harbour views.



Photograph Ref:9178 taken 8 March 2023 at 9:29am with 50m(35mm equivalent) focal length

Photomontage by Pam Walls  
Based on True North Survey Ref:1091-17/02/2022  
ESS Lifestyle DA Drawings Ref:0158-25/05/2022

View with 3D solid block computer model of proposed No.47 and indicative landscaping  
View from 18 Tutus St, Balgowlah main external living balcony  
Objection to 47 Beatty St, Balgowlah-DA2022/2280

*The roof terrace, retractable awning, stairs, balustrading, stairwell wall and raised parapet wall shall be deleted from the roof level. The roof level shall consist of roof planting, with species consistent with the submitted landscape plan, and have no structures exceeding RL 36.2 placed on the roof (apart from landscaping).*

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council.

## **9. Impacts Upon Adjoining Properties: Overshadowing**

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to overshadowing.

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of my clients' property, to assess the loss of solar access at mid-winter, of my client's windows, private open space, and PV Solar Panels to accord with DCP controls and NSWLEC planning principles.

The excessive overshadowing of my client's property to the south and east of the subject site, is a direct result of the excessive FSR, Wall Height and Setbacks.

The north facing windows of the residence of Les & Marie Randolph at 35 Hay Street, Collaroy, will be poorly affected.

There are 13 Trees proposed that are over the 7.2m Wall Height Controls. We ask for all trees over 7m to be deleted from the Landscape Plan and replaced by lower height species.

All plants in the solar access corridors of neighbours must be reduced to 3m or lower to protect solar access.

#### SCHEDULE OF PLANT MATERIAL

CODE	BOTANICAL NAME	COMMON NAME	QUANTITY	MATURE HEIGHT	CONTAINER SIZE	STAKES							
HS	<i>Hibbertia scandens</i> *	Guinea Flower	20	0.4m	140mm	-							
Lr	<i>Liriope 'Just Right'</i>	Turf Lily	94	0.4m	140mm	-							
LI	<i>Lagerstroemia indica 'Sioux'</i>	Crape Myrtle	7	4m	100 litre	2							
LLT	<i>Lomandra longifolia 'Tanika'</i>	Tanika Lomandra	50	0.4m	140mm	-							
LS	<i>Lomandra 'Seascape'</i>	Seascape Lomandra	104	0.4m	140mm	-							
MP	<i>Myoporum parvifolium</i> *	Creeping Boobialla	12	0.1m	140mm	-							
AN	<i>Asplenium nidus</i> *	Birds Nest Fern	29	1m	200mm	-							
APs	<i>Acer palmatum 'Senkaki'</i>	Sydney Barked Maple	2	4m	100 litre	2							
PTb	<i>Phormium tenax 'Bronze Baby'</i>	Dwarf NZ Flax	29	1m	200mm	-							
PTrm	<i>Phytolobum tobira 'Miss Muffet'</i>	Miss Muffet Tobira	13	1.5m	200mm	-							
PX	<i>Philodendron 'Xanadu'</i>	Xanadu	10	0.75m	200mm	-							
RE	<i>Raphis excelsa</i>	Lady Palm	6	2.5m	300mm	-							
RI	<i>Rhaphiolepis indica</i>	Indian Hawthorn	27	1.5m	200mm	-							
SAs	<i>Syzygium australe 'Elegance'</i>	Dwarf Lili Pili	8	1.5m	200mm	-							
SAP	<i>Syzygium australe 'Pinnacle'</i>	Dwarf Lili Pili	25	3m	200mm	-							
SC	<i>Syzygium 'Cascade'</i>	Cascade Lili Pili	21	2m	300mm	-							
SS	<i>Senecio serpens</i>	Blue Chalk Sticks	16	0.3m	200mm	-							
SSn	<i>Syzygium 'Straight and Narrow'</i>	Lili Pili	29	5m	200mm	-							
STI	<i>Syzygium 'Tiny Treu'</i>	Dwarf Lili Pili	24	0.6m	200mm	-							
TL	<i>Tristaniaopsis laurina 'Luscious'</i>	Water Gum	3	5m	75 litre	2							
VH	<i>Viola hederacea</i> *	Native Violet	48	0.1m	140mm	-							
VO	<i>Viburnum odoratissimum</i>	Sweet Viburnum	22	2.5m	200mm	-							
WAb	<i>Westringia fruticosa 'Aussie Box'</i>	Dwarf Coastal Rosemary	29	1m	200mm	-							
WF	<i>Westringia fruticosa</i> *	Coastal Rosemary	7	2m	200mm	-							
WFm	<i>Westringia fruticosa 'Mundi'</i>	Coastal Rosemary	9	0.5m	200mm	-							

\* indicated native plant species.

My clients believe that further assessment of the shadow impacts through the production of elevational shadow diagrams assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of adjoining properties, specifically with regard to overshadowing.

The proposed development will result in unreasonable overshadowing of the windows of my clients' property and the private open space of my clients' property, resulting in non-compliance with the provisions of DCP.

A variation to the DCP is not supported as the objectives of the clause are not achieved.

The non-compliant FSR and Wall Height directly cause the poor solar outcomes.

In The Benevolent Society v Waverley Council [2010] NSWLEC 1082 the LEC consolidated and revised planning principle on solar access is now in the following terms:

*"Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours."*

My clients contend that the overshadowing arises out of poor design. The design does not respect envelope controls, and must be considered 'poor design'.

The Applicant has not submitted hourly solar diagrams to fully assess the solar loss. My clients ask Council to obtain these diagrams.

The loss of sunlight is directly attributable to the non-compliant envelope.

The planning principle *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 is used to assess overshadowing for development application. An assessment against the planning principle is provided as follows:

- *The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong.*

The density of the area is highly controlled. Building envelope controls have been exceeded.

- *The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.*

The solar diagrams are not complete, but what has been provided shows that the proposed development will overshadow the adjoining dwellings. The amount of sunlight that will be lost will only be able to be fully considered once solar elevational drawings are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.*

The proposed development has been designed without considering the amenity of the neighbouring properties. It is considered that a more skilful design, with a compliant envelope control, could have been adopted that would have reduced the impact on the neighbouring properties. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5o or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.*

This can only be fully assessed once elevational solar drawings at hourly intervals are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.*

There is no major overshadowing as a result of vegetation

- *In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development.*

The area is not currently undergoing change, the LEP and DCP controls have not altered for many years.

The assessment of the development against the planning principal results in the development not complying with the solar access controls and therefore amended plans should be requested to reduce the overshadowing impact on the adjoining neighbour. It is suggested that a more skilful design of the development, with a compliant envelope control, would result in less impact in regard to solar access. It is requested that Council seek amended plans for the development to reduce the impact of the development, and these matters are addressed elsewhere in this Written Submission.

My clients object to solar loss to my clients' private open space, and to my clients' windows that fails to allow mid-winter solar access into highly used room by non-compliant development controls.

## **10. Impacts Upon Adjoining Properties: Privacy**

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual privacy.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of my clients' property, specifically with regard to visual privacy.

The proposed development will result in unacceptable overlooking of the adjoining dwelling and associated private open space, resulting in inconsistency with the provisions of the DCP and the objectives of the DCP.

The Applicant has not provided an adequate Privacy Impact Analysis which details the extent to which privacy at my clients' property will be adversely impacted by the proposal.

An assessment of the privacy impact against the planning principle *Meriton v Sydney City Council* [2004] NSWLEC 313 follows:

*Principle 1: The ease with which privacy can be protected is inversely proportional to the density of development. At low-densities there is a reasonable expectation that a dwelling and some of its private open space will remain private. At high-densities it is more difficult to protect privacy.*

Response: The development is located in a low-density area.

*Principle 2: Privacy can be achieved by separation. The required distance depends upon density and whether windows are at the same level and directly facing each other. Privacy is hardest to achieve in developments that face each other at the same level. Even in high-density development it is unacceptable to have windows at the same level close to each other. Conversely, in a low-density area, the objective should be to achieve separation between windows that exceed the numerical standards above. (Objectives are, of course, not always achievable.)*

Response: The proposed development results in a privacy impact with the proposed windows facing neighbours without sufficient screening devices being provided, considering the proposed windows are directly opposite my clients' windows and balconies.

*Principle 3: The use of a space determines the importance of its privacy. Within a dwelling, the privacy of living areas, including kitchens, is more important than that of bedrooms. Conversely, overlooking from a living area is more objectionable than overlooking from a bedroom where people tend to spend less waking time.*

Response: The windows in question are windows of the main circulation zones and living areas, it is considered that the living areas will result in an unacceptable privacy breach. The proposed windows and decks face the rear private open spaces for the neighbouring dwelling and will result in an unacceptable level of privacy impact.

*Principle 4: Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.*

Response: The proposed development is a new development and the proposed windows have been designed without any consideration to the privacy of the neighbouring property.

*Principle 5: Where the whole or most of a private open space cannot be protected from overlooking, the part adjoining the living area of a dwelling should be given the highest level of protection.*

Response: It is considered that the private open space of the neighbouring dwellings could be better protected. My clients ask Council to consider the most appropriate privacy screening measures to be imposed on windows and decks facing my clients' property, including landscaping

*Principle 6: Apart from adequate separation, the most effective way to protect privacy is by the skewed arrangement of windows and the use of devices such as fixed louvres, high and/or deep sills and planter boxes. The use of obscure glass and privacy screens, while sometimes being the only solution, is less desirable.*

Response: As mentioned above, the use of privacy devices would reduce the impact of the dwelling.

*Principle 7: Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight.*

Response: Additional landscaping may assist in addition to privacy devices.

*Principle 8: In areas undergoing change, the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered.*

Response: The area is not undergoing change that would warrant privacy impact such as the one presented.

Comment: As the development is considered to result in an unacceptable privacy impact due to the design, it is requested that the proposed development be redesigned to reduce amenity impact on the neighbouring properties.

In the context of the above principles, the application can be considered to violate the reasonable expectation that the habitable rooms and private open space at my clients' property will remain private. It is therefore reasonably anticipated that the application does not comply with the DCP.

The above non-compliance will give rise to unreasonable amenity impacts upon the adjoining properties. In this instance, the proposal is not considered to achieve compliance with this control.

### **11. Impacts Upon Adjoining Properties: Excessive Excavation, Geotechnical Concerns, Stormwater Concerns & Flood Concerns**

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide minimal excavation, with excavation proposed too close to the neighbours' property.

The proposed development provides excessive excavation.

I have numerous concerns:

- A failure of the slope that falls across the property and continues above at moderate angles failing and impacting on the proposed works.
- The vibrations produced during the proposed excavation impacting on the surrounding structures.
- The excavation collapsing onto the work site before retaining structures are in place.
- Excessive vibration recommendations considering the age and fragility of neighbours' properties

I have other concerns:

- The geotechnical report appears to be written well before final issue of the Architect's drawings;
- The geotechnical report does not reference the relevant Council policy or the sites landslip hazard zoning providing no certainty that the site zoning or policy was considered in its preparation
- The geotechnical report is not accompanied by forms of the policy, as is required for submission and acceptance of the report by Council, and which confirm that engineer has assessed the conditions as per the policy and holds Professional Indemnity Insurance
- The geotechnical report references "*Basement excavation is expected to extend to approximately 3.0 m below ground level (mBGL)*" however bulk excavations of up to approx. 5m to 6m depth are proposed at the south-west corner of the site [RL 24.0m contour – RL 19.1m basement level – depth of basement slab zone]
- The geotechnical report shows little investigation upon which the report is based and is limited to conducting of limited DCP test and limited boreholes that extended through soils before being terminated at shallow depth within soils without identification of bedrock.
- There is no borehole adjacent to the southern boundary of the site, where 5m-6m deep construction is proposed
- The geotechnical report does not provide an appropriate extent of risks and potential landslide hazards and treatment options.
- The geotechnical report provides no description of adjacent properties or conditions/hazards with these properties that could be impacted by or impact upon the development (ie. boulders, stabilised outcrops)
- The geotechnical report provides little recommendations for excavation support systems, provides no parameters for design and assessment of retention systems

The geotechnical report supplied does not meet the Council's policy requirements or objectives and as such should not be accepted by Council with the Development Application.

The geotechnical report provides limited assessment which does not appear site or development specific, provides no design or construction recommendations to maintain stability within the "Acceptable Risk Management" criteria and involved very limited and shallow investigation for what are deep excavations into the hill slope that have high potential for detrimental impact on adjacent properties and structures.

As such, should approval of the proposed development occur based on the supplied geotechnical report, then serious concerns should be held for the stability and protection of my client's property and house.

My clients have geotechnical concerns.



- Stability of the natural hillside slope; upslope of the proposed development, beneath the proposed development, downslope of the proposed development and to all neighbour's land.
- Stability of existing retaining walls that will remain;
- Stability of proposed retaining walls to support the excavations for the proposed residence, and external landscaping walls.
- Incomplete consideration of landslip hazards
- Incomplete consideration of Natural Hillside Slope
- Incomplete consideration to create a Large-Scale Translational Slide
- Incomplete consideration of Existing Retaining Walls
- Incomplete consideration of Proposed Retaining Walls
- Incomplete consideration of partial excavation of large boulders
- Incomplete consideration and inadequate identification of 'floaters' across neighbour's boundary
- Incomplete consideration of Surface Erosion
- Incomplete consideration of potential Rock Fall
- Incomplete consideration of landslip of soils from excavation

My clients have concerns regarding the lack of extensive recommendations in respect to the following:

- Incomplete Conditions Recommended to Establish the Design Parameters
- Incomplete Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate
- Incomplete Conditions Recommended During the Construction Period
- Incomplete Conditions Recommended for Ongoing Management of the Site/Structure(s)
- Incomplete Geotechnical Risk Management Forms

The Geotechnical report does not contain the full extent of conditions normally associated with this type of deep 5m to 6m excavation on a slope. Some of these matters are partially addressed but not all.

Typical conditions are as follows:

#### Conditions Recommended to Establish the Design Parameters

- all existing landscaping retaining walls within the site will be replaced as part of the development.
- a geotechnical investigation of the site should be carried out to confirm the subsurface conditions prior to the start of excavation. The investigation should be carried out following demolition so access to the entire site for a drilling rig is possible.
- at least four boreholes be drilled, involving coring of the rock to assess its quality
- Cone Penetration Testing across the site to determine the soil profile and consistency;
- Boreholes for soil identification and collection of laboratory samples;
- Installation of groundwater monitoring wells with data loggers to measure groundwater levels before and during construction;
- Permeability testing in wells;

- Groundwater modelling to assess inflows and drawdown;
- Shoring wall analyses.
- Assess the groundwater level and fluctuations across the site and provide a detailed groundwater assessment to predict soil permeability, inflow rates, drawdown and its effect in the short and long term for the site and surrounding properties;
- Excavations are expected to encounter sandstone bedrock and where such excavation is carried out using a hydraulic rock hammer continuous vibration monitoring must be carried out during rock hammer use. Vibration monitors should be set up on the adjoining houses. The ground vibration measured as peak particle velocity must not exceed 5mm/sec at the site boundaries, or 3mm/sec on older fragile properties. Lower PPV may be necessary due to the structural design of neighbouring properties
- Subject to inspection by a geotechnical engineer temporary batters for the proposed excavation should be no steeper than 1 Vertical (V) in 1 Horizontal (H) within the soil profile and extremely weathered rock and vertical in competent rock. All surcharge and footing loads must be kept well clear of the excavation perimeter.
- Where the required batters cannot be accommodated within the site geometry, or where not preferred, a retention system would be required and should be installed prior to excavation commencing.
- proposed new retaining walls should be designed using parameters set out by the geotechnical engineer, such as: For cantilever walls, adopt a triangular lateral earth pressure distribution and an 'active' earth pressure coefficient,  $K_a$ , of 0.3, for the retained height, assuming a horizontal backfill surface. A bulk unit weight of 20kN/cubm should be adopted for the soil profile. Any surcharge affecting the walls (e.g. traffic loading, live loading, compaction stresses, etc) should be allowed in the design. Propped or anchored retaining walls may be designed based on a trapezoidal lateral pressure distribution of  $6H$  kPa, where  $H$  is the retained height in metres, assuming no structures are located within  $2H$  of the wall. The retaining walls should be provided with complete and permanent drainage of the ground behind the walls. The subsoil drains should incorporate a non-woven geotextile fabric (e.g. Bidim A34), to act as a filter against subsoil erosion. For soldier pile walls strip drains should be placed behind the shotcrete panels. Toe resistance of the wall may be achieved by keying the footing into bedrock. An allowable lateral stress of 200kPa may be adopted for design.
- No rock anchors beyond the subject site boundary
- All proposed footings must be founded in sandstone bedrock. The footings should be designed for an allowable bearing pressure of 600kPa, subject to inspection by a geotechnical engineer prior to pouring.
- The surface water discharging from the new roof and paved areas must be diverted to outlets for controlled discharge to the existing stormwater system which appears to drain to the north. Any stormwater discharge must be spread across the slope and not discharged in a concentrated manner.
- The guidelines for Hillside Construction should also be adopted.

Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate

- All structural design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle. As the construction certificate will need to be obtained prior to demolition, the structural drawings prepared for the construction certificate application will require review following completion of the geotechnical investigation and must be marked as such. The need for the geotechnical investigation following demolition must be clearly stated on the construction certificate structural drawings.
- All hydraulic design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- All landscape design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- Dilapidation surveys must be carried out on the neighbouring buildings and structures. A copy of the dilapidation report must be provided to the neighbours and Council or the Principle Certifying Authority.
- An excavation/retention methodology must be prepared prior to bulk excavation commencing. The methodology must include but not be limited to proposed excavation techniques, the proposed excavation equipment, excavation sequencing, geotechnical inspection intervals or hold points, vibration monitoring procedures, monitor locations, monitor types, contingency plans in case of exceedances.
- The excavation/retention methodology must be reviewed and approved by the geotechnical engineer.
- A Geotechnical Monitoring Plan is to be prepared which will detect any settlement associated with temporary and permanent works and structures; Will detect vibration in accordance with AS 2187 .2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity); Will detect groundwater changes calibrated against natural groundwater variations; Details the location and type of monitoring systems to be utilised; Details the pre-set acceptable limits for peak particle velocity and ground water fluctuations; Details recommended hold points to allow for the inspection and certification of geotechnical and hydro-geological measures by the professional engineer; and Details a contingency plan.
- A geotechnical investigation meeting the requirements of TfNSW Technical Direction Geotechnology GTD 2020/001 | Version No. 01 – 2 July 2020 *Excavation adjacent to Transport for NSW Infrastructure*. This investigation will relate to the proximity of the excavation to the road
- Geotechnical assessment meeting the requirements of Sydney Water, *Technical guidelines, Building over and adjacent to pipe assets*, August 2021. This assessment will relate to the proximity of the excavation to the existing sewer main.
- A minimum of four cored boreholes extending to at least 3 m below the proposed bulk excavation level. A monitoring well is to be installed in at least one borehole the presence or otherwise of a groundwater level within the proposed depth of excavation established prior to design.
- Rock grinders are to be used for excavation. Hydraulic rock hammering is not to be used for excavation as it has the potential to provoke rock instability of the existing cliff face.

- Vibration monitoring limits are to be set at maximum Peak Particle Velocity of 5 mm/sec on neighbouring properties, or 2mm/sec to heritage, historical, structures in sensitive and fragile conditions or older fragile dwellings.
- Monitoring is to be carried out during demolition and excavation using a vibration monitoring instrument [Vibra] and alarm Levels [being the appropriate PPV] selected in accordance with the type of structures present within the zone of influence of the proposed excavation. If vibrations in adjacent structures exceed the above values or appear excessive during construction, excavations should cease, and the project Geotechnical Engineer should be contacted immediately for appropriate review.

#### Conditions Recommended During the Construction Period

- The recommendations provided below must be reviewed and amplified following completion of the geotechnical investigation. The recommendations given below assume that good quality rock will be encountered at relatively shallow depths.
- The structural drawings must be updated following completion of the geotechnical investigation and subsequently reviewed by the geotechnical engineer to confirm that the geotechnical recommendations have been adopted.
- The approved excavation/retention methodology must be followed.
- Bulk excavations must be progressively inspected by the geotechnical engineer as excavation proceeds. We recommend inspections at 1.5m vertical depth intervals and on completion.
- The geotechnical engineer must inspect all footing excavations prior to placing reinforcement or pouring the concrete.
- Proposed material to be used for backfilling behind retaining walls must be approved by the geotechnical engineer prior to placement.
- Compaction density of the backfill material must be checked by a NATA registered laboratory to at least Level 2 in accordance with, and to the frequency outlined in, AS3798, and the results submitted to the geotechnical engineer.
- If they are to be retained, the existing stormwater system, sewer and water mains must be checked for leaks by using static head and pressure tests under the direction of the hydraulic engineer or architect, and repaired if found to be leaking.
- The geotechnical engineer must inspect all subsurface drains prior to backfilling.
- An 'as-built' drawing of all buried services at the site must be prepared (including all pipe diameters, pipe depths, pipe types, inlet pits, inspection pits, etc).
- All rock anchors must be proof-tested to 1.3 times the working load. In addition, the anchors must be subjected to lift-off testing no sooner than 24 hours after locking off at the working load. The proof-testing and lift-off tests must be witnessed by the geotechnical engineer. The anchor contractor must provide the geotechnical engineer with all field records including anchor installation and testing records. No rock anchors under neighbours property.

- The geotechnical engineer must confirm that the proposed alterations and additions have been completed in accordance with the geotechnical reports.

#### Conditions Recommended for Ongoing Management of the Site/Structure(s)

The following recommendations have been included so that the current and future owners of the subject property are aware of their responsibilities:

- All existing and proposed surface (including roof) and subsurface drains must be subject to ongoing and regular maintenance by the property owners. In addition, such maintenance must also be carried out by a plumber at no more than ten yearly intervals; including provision of a written report confirming scope of work completed (with reference to the 'as-built' drawing) and identifying any required remedial measures.
- The existing retaining walls on the western and eastern boundaries that are to remain must be inspected by a structural engineer at no more than ten yearly intervals; including the provision of a written report confirming scope of work completed and identifying any required remedial measures
- No cut or fill in excess of 0.5m (e.g. for landscaping, buried pipes, retaining walls, etc), is to be carried out on site without prior consent from Council.
- Where the structural engineer has indicated a design life of less than 100 years then the structure and/or structural elements must be inspected by a structural engineer at the end of their design life; including a written report confirming scope of work completed and identifying the required remedial measures to extend the design life over the remaining 100 year period.

#### Other Conditions:

- It is possible that the subsurface soil, rock or groundwater conditions encountered during construction may be found to be different (or may be interpreted to be different) from those inferred from the surface observations
- Surface run-off patterns during heavy rainfall may present poor outcomes

Concern is raised that the Geotechnical report has not fully addressed these matters

- Comprehensive site mapping conducted - inadequate
- Mapping details presented on contoured site plan with geomorphic mapping
- Subsurface investigation required
- Geotechnical model developed and reported as an inferred subsurface type-section
- Geotechnical hazards identified
- Geotechnical hazards described and reported
- Risk assessment conducted in accordance with the Geotechnical Risk Management Policy; Consequence analysis & Frequency analysis
- Risk calculation
- Risk assessment for property conducted in accordance with the Geotechnical Risk Management Policy
- Risk assessment for loss of life conducted in accordance with the Geotechnical Risk Management Policy

- Assessed risks have been compared to “Acceptable Risk Management” criteria as defined in the Geotechnical Risk Management Policy
- Opinion has been provided that the design can achieve the “Acceptable Risk Management” criteria provided that the specified conditions and recommendations presented in the Report are achieved recommendations presented in the Report are adopted.
- Design Life Adopted:100 years
- Geotechnical Conditions to be applied to all four phases as described in the Geotechnical Risk Management Policy
- Additional action to remove risk where reasonable and practical have been identified and included in the report.

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including intrusive geotechnical investigations, incomplete geotechnical recommendations, incomplete geotechnical monitor plan, excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone.

My clients ask for the Geotechnical Report to be updated to include all these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report.

### **Stormwater Concerns**

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate stormwater control outcomes.

My clients ask Council to consider the stormwater design and the OSD.

My clients ask Council to ensure that there are stormwater pits to collect surface and sub surface stormwater along the perimeter of the subject site.

### **Flood Concerns**

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate flood protection.

My client's report excessive overland flood waters from the subject site during heavy downpours.

Stormwater pits to collect surface and sub surface stormwater along the perimeter of the subject site, and collection of flow around the basement construction, may assist in resolving some of these problems.

The proposed development does not accord with flood control.

My clients are concerned that there is no adequate Overland Flood Study to include: Hydrological data; Hydraulics data; Catchment plan showing sub-catchments (where applicable); Computer model such as HEC-RAS showing the 1%; AEP stormwater flow over the subject site; Cross sections detailing the 20% and 1% AEP water surface levels traversing the site; Extent of water surface levels to extend upstream and downstream of the subject property; Any overland flow mitigation measures to protect the proposed development from stormwater inundation must not exacerbate flooding for adjoining properties by diverting more flows to adjoining properties

My clients ask Council to address the following:

- Council is to ensure that the works proposed on the site are capable of accommodating all storm events including the 1 in 100 year design storm with no adverse impacts to my clients' property.
- Council is to ensure that the overland flow path provided is capable of accommodating all reasonable development and redevelopment in the catchment draining to the proposed overland flow path.
- Council is to ensure that the development will not result in a net loss in flood storage or floodway in 1% AEP flood. These calculations must be provided and mapping of the floodway in relation to the proposed building must also be provided.
- Council is to ensure that my clients' property will have no increase in PMF levels and PMF peak velocity on neighbouring properties.

## **12. Impacts Upon Adjoining Properties: Traffic**

My clients in Hay Street have significant concerns on the traffic implications of the proposed development.

The number of car spaces is driven by the excessive number of proposed Units, that is driven by the excessive FSR and GFA.

In simple terms, there is a third more cars being housed than the site and the surrounding streets should be asked to carry.

Hay Street is a narrow 7.2m wide street. As cars are parked on both sides of the street, most users do not attempt to pass each other, but to pull in and allow others to pass safely. I have a significant concern on safety. Positioning a high-volume car entry into this locality in Hay Street is unacceptable.

The proposal only allows for two visitor parking spaces within the basement. The on-street parking in this area is already at capacity. Inserting visitor parking for 11 dwellings into the street is considered by my Hay Street clients as totally unacceptable.

Hay Street already accommodates overflow traffic from the nearby highly popular food outlets, sporting events from the oval on the eastern side of Pittwater Road,

dog park visitors to Griffith Park, the children play park visitors to Griffith Park and people who park their car and walk around the Long Reef Headland.

The design of the parking is unacceptable considering the users are seniors and residents with disability. The reverse parking requirements for many of the spaces is unacceptably difficult.

There is no consideration to where delivery vehicles will be positioned to service a high volume of Units.

### **13. Precedent**

The Development Application should be refused because approval of the proposal will create an undesirable precedent for similar inappropriate development in the area.

### **14. Public Interest**

The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest.



#### **D. CONTENTIONS THAT RELATE TO INSUFFICIENT & INADEQUATE INFORMATION**

The applicant has not submitted sufficient and/or adequate information as requested by Council under Part 6, Division 1 Clause 54 of the EPA Regulation 2000 to enable a reasonable assessment under the applicable legislation.

The application lacks sufficient detail to make an informed assessment particularly with respect to determining the extent of the following matters and the relationship and impact to adjoining neighbours.

##### **View Impact Analysis**

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property are obstructed under the current proposal, from the proposed built form and the proposed trees, to accord with DCP controls and NSWLEC planning principles

My clients ask Council that after amended plans are submitted to reduce the building envelope below building height, wall height, and all envelope controls, to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

##### **Solar Access Diagrams**

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of my clients' property, to assess the loss of solar access at mid-winter, to accord with DCP controls and NSWLEC planning principles

My clients believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

##### **Privacy Impact Analysis**

The Applicant has not provided an adequate Privacy Impact Analysis, to accord with DCP controls and NSWLEC planning principles.

##### **Visual Bulk Analysis**

The Applicant has not provided adequate montages from my clients' property to assess the visual bulk assessment from the proposed non-compliant envelope.

**Existing and Finished Ground Levels**

Spot levels and contour lines from the Registered Surveyors drawings have not been transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessment of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA.

**Geotechnical**

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone. The geotechnical requirements referred to earlier must be added to the Geotechnical Report. My clients ask for the Geotechnical Report to be updated to include these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans.

## **E. REQUEST FOR AMENDED PLANS TO BE SUBMITTED TO BETTER ADDRESS IMPACTS UPON ADJOINING PROPERTIES**

A compliant building design would reduce the amenity impacts identified.

Prepare and submit further supporting information and amendments to the assessing officer directly addressing the issues.

Reduce the proposed development as follow:

### **1. REDUCTION OF BUILT FORM**

- Reduce built form to better share the ocean views to the north-east, by a significant reduction of built form to the rear of the proposed development to ensure the view from the highly used rooms and entertainment decks at 35 Hay Street, Collaroy is better shared. A significant reduction of built form to the rear as the projection to the east, severely affects view
- Reduce built form to better share the ocean views to the east, by a significant reduction of built form of the proposed development to ensure the view from the highly used rooms and entertainment decks at all Hay Street properties on the high side of the street, is better shared, by creating multi 'pavilion' outcome with clear breaks east/west through the proposed development, and a significant reduction of built form to the rear as the leading edge to the east, severely affects view
- Reduce built form to reduce overshadowing impacts to 35 Hay Street, Collaroy and 985 Pittwater Road Collaroy;
- Reduction of FSR to 0.5:1, to create a 'pavilion' outcome with clear breaks east/west through the proposed development
- The number of units and cars need to be reduced by a third
- Consider the increase of basement ramp grades to 25% to lower the entire built form by 1.0m
- Delete excessive 4.2m storey heights at the Upper Level – significant concerns on view loss
- Consider reduction of ground floor, to maintain basement storey height to 2800mm in all locations. Proposed basement ceiling heights 3.5m and 3.2m are excessive – 2500mm is adequate for disability spaces
- Reduce the Wall Heights to DCP controls
- Increase Eastern Setbacks 6.5m. Delete all built form.
- Increase Anzac Street Setback to 3.5m. Delete all built form.
- Delete all built from within Side Boundary Envelope
- Decrease excavation, with no excavation or fill in setback zones
- Delete elevated structures built onto the eastern boundary. Maintain existing levels in the 6m eastern setback zone. Boundary fences not to exceed 1.8m high.
- Position stormwater grated surface inlet pits along the eastern and southern boundary, at 4m centres, to collect surface and sub surface stormwater.

Increase engineering collection of water around the basement, and along the eastern and southern boundary

- Solar panels to lie flat on the roof and not to exceed maximum roof height

## **2. PRIVACY DEVICES**

- Privacy screening to a height of at least 1.7m measured from the FFL level is to be incorporated along the full extent of all windows to the side elevations, and to all balconies at the first floor which face the side boundary. Privacy screening to be fixed obscured glazing or fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development.

## **3. LANDSCAPING**

- Tree planting shall be located to minimise impacts on view loss.
- To maintain view sharing, the proposed trees and plants over 7m in height shall be deleted in the landscape plan and replaced by lower height species.
- All plants in the viewing corridors of neighbours must be reduced to 3m or lower to protect the view
- Tree canopy planting must be located at least 3m from buildings and 5m from common boundaries, to avoid excessive canopy protruding over neighbour's property.

## **4. CONDITIONS OF ANY CONSENT**

My client asks for a complete set of Conditions to be included within any consent, including, but not limited to, the following:

Conditions which must be satisfied prior to the demolition of any building or construction

- Acoustic Certification of Mechanical Plant and Equipment
- Arborists Documentation and Compliance Checklist
- BASIX Commitments
- Checking Construction Certificate Plans – Protecting Assets Owned by Sydney Water
- Construction Certificate Required Prior to Any Demolition
- Demolition and Construction Management Plan
- Electric vehicle circuitry and electric vehicle charging point requirements
- Engineer Certification
- Establishment of Tree Protection Zone (TPZ) Fence
- Geotechnical and Hydrogeological Design, Certification and Monitoring
- Ground Anchors
- Identification of Hazardous Material
- Light and Ventilation
- No Underpinning works
- Noise Control - Acoustic Protection of adjoining residential units-Operation of Air Conditioning Plant

- Noise Control - Swimming pool/spa pool pumps and associated equipment
- Parking Facilities
- Payment of Long Service Levy, Security, Contributions and Fees
- Professional Engineering Details
- Public Road Assets Prior to Any Work/Demolition
- Road and Public Domain Works
- Soil and Water Management Plan – Submission and Approval
- Stormwater Management Plan
- Swimming and Spa Pools – Backwash
- Swimming and Spa Pools – Child Resistant Barriers
- Tree Management Plan
- Ventilation - Internal Sanitary Rooms
- Utility Services Generally
- Waste Storage – Per Single Dwelling

Conditions which must be satisfied prior to the commencement of any development work

- Adjoining Buildings Founded on Loose Foundation Materials
- Building - Construction Certificate, Appointment of Principal Certifier, Appointment of Principal Contractor and Notice of Commencement (Part 6, Division 6.3 of the Act)
- Compliance with Building Code of Australia and insurance requirements under the
- Dilapidation Reports for Existing Buildings
- Erosion and Sediment Controls – Installation
- Establishment of Boundary Location, Building Location and Datum
- Home Building Act 1989
- Notification of Home Building Act 1989 requirements
- Security Fencing, Hoarding (including 'Creative Hoardings') and Overhead Protection
- Site Signs
- Toilet Facilities
- Works (Construction) Zone – Approval and Implementation

Conditions which must be satisfied during any development work

- Asbestos Removal Signage
- Check Surveys - boundary location, building location, building height, stormwater drainage system and flood protection measures relative to Australian Height Datum
- Classification of Hazardous Waste
- Compliance with Australian Standard for Demolition
- Compliance with BCA and Insurance Requirements under the Home Building Act 1989
- Compliance with Council's Specification for Roadworks, Drainage and
- Compliance with Geotechnical / Hydrogeological Monitoring Program
- Miscellaneous Works, Road Works and, Work within the Road and Footway
- Critical Stage Inspections

- Disposal of Site Water During Construction
- Disposal of Asbestos and Hazardous Waste
- Dust Mitigation
- Erosion and Sediment Controls – Maintenance
- Footings in the vicinity of trees
- Hand excavation within tree root zones
- Hours of Work –Amenity of the Neighbourhood
- Installation of stormwater pipes and pits in the vicinity of trees
- Level changes in the vicinity of trees
- Notification of Asbestos Removal
- Maintenance of Environmental Controls
- Placement and Use of Skip Bins
- Prohibition of Burning
- Public Footpaths – Safety, Access and Maintenance
- Replacement/Supplementary trees which must be planted
- Requirement to Notify about New Evidence
- Site Cranes
- Site Waste Minimisation and Management – Construction
- Site Waste Minimisation and Management – Demolition
- Support of Adjoining Land and Buildings
- Tree Preservation
- Vibration Monitoring

Conditions which must be satisfied prior to any occupation or use of the building  
(Part 6 of the Act and Part 8 Division 3 of the Regulation)

- Amenity Landscaping
- Certification of Electric Vehicle Charging System
- Commissioning and Certification of Public Infrastructure Works
- Commissioning and Certification of Systems and Works
- Occupation Certificate (section 6.9 of the Act)
- Letter Box

Conditions which must be satisfied prior to the issue of the Occupation Certificate for  
the whole of the building

- Fulfillment of BASIX Commitments – clause 154B of the Regulation
- Landscaping
- Positive Covenant and Works-As-Executed Certification of Stormwater Systems
- Removal of Ancillary Works and Structures
- Road Works (including footpaths)

Conditions which must be satisfied during the ongoing use of the development

- Maintenance of BASIX Commitments
- Noise Control
- Noise from mechanical plant and equipment, including swimming pool plant

- Ongoing Maintenance of the Onsite Stormwater Detention (OSD) System, Rain Garden and Rainwater Tank
- Outdoor Lighting – Residential
- Outdoor Lighting – Roof Terraces

#### Advising

- Asbestos Removal, Repair or Disturbance
- Builder's Licences and Owner-builders Permits
- Building Standards - Guide to Standards and Tolerances
- Commonwealth Disability Discrimination Act 1992
- Criminal Offences – Breach of Development Consent and Environmental Laws
- Dial Before You Dig
- Dilapidation Report
- Dividing Fences
- Lead Paint
- NSW Police Service and Road Closures
- Pruning or Removing a Tree Growing on Private Property
- Pruning or Removing a Tree Growing on Private Property
- Recycling of Demolition and Building Material
- Release of Security
- Roads Act 1993 Application
- SafeWork NSW Requirements
- Workcover requirements

## F. REASONS FOR REFUSAL

My clients ask Council to **REFUSE** the DA as the proposal is contrary to the Environmental Planning and Assessment Act:

1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the following provisions of the State Environmental Planning Policy (Housing) 2021
2. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the desired future character
3. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Warringah Local Environmental Plan 2000 in that the proposal is inconsistent with the 'General Principles of Development Control'. Part 4, Section 40, 52, 61, 62, 63A, 65, 66, 67, 76,
4. Pursuant to Section 4.15(1) (a) (i) and (b) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Schedule 16, Clause 21 Neighbourhood amenity and streetscape the Warringah Local Environmental Plan 2000.
5. Pursuant to Section 4.15 (1) (b) and (c) of the Environmental Planning and Assessment Act 1979 the proposed development is unsuitable for the site. In particular the proposal exceeds the threshold considerations for 'low intensity low impact' development as established within *Vigour Master Pty v Warringah Shire Council* [2003] NSWLEC 1128
6. Pursuant to Section 4.15 (1) (e) of the Environmental Planning and Assessment Act 1979 the proposed development is not in the public interest. In particular, the proposal does not meet the provisions of the relevant local environmental planning instrument for the creation of a better environment and maintaining the desired future character of the locality.
7. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Environmental Planning and Assessment Act 1979
8. Adverse visual impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated view impacts to the adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP
9. Adverse solar impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated solar impacts to the



adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP.

10. Adverse visual and acoustic privacy impacts to adjoining properties. The proposal does not demonstrate effective mitigation of overlooking to adjoining properties from balconies and windows.
11. The extent of excavation is excessive. The proposal is contrary to the objective of the DCP, in that it does not minimise excavation and has potential adverse impacts on existing and proposed vegetation.
12. Council is not satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because it is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.
13. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of LEP:
  - Aims of Plan
  - Zone Objectives
  - FSR
  - Exceptions to Development Standards
  - Flood
  - Earthworks
  - Stormwater
  - Geotechnical Hazards
14. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of DCP:
  - Excessive Wall Height
  - Unacceptable Building Separation
  - Insufficient Landscape Areas
  - Excessive Removal of Native Trees, frequented by the protected Tawny Frogmouth Owls and the threatened Powerful Owls.
  - Poor Strategic Positioning of Tree Canopy
  - Poor Garage Design
  - Excessive Excavation & Geotechnical Concerns
  - Stormwater Concerns
  - Flood Concerns
  - Poor Streetscape Outcomes
  - Impacts Upon Adjoining Properties: View Loss
  - Impacts Upon Adjoining Properties: Overshadowing
  - Impacts Upon Adjoining Properties: Privacy
  - Impacts Upon Adjoining Properties: Visual Bulk

15. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment. Dimensions to boundaries have not been shown in all locations of all proposed built elements. Levels on all proposed works have not been shown.
16. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the proposal would not satisfy the matters for consideration under Biodiversity & Conservation SEPP 2021 and Resilience & Hazards SEPP 2021
17. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that it will have an adverse impact through its bulk, scale and siting on the built environment, and through lack of landscape provision, and adverse impact on the natural environment. The proposed development will have a detrimental impact on the visual amenity of the adjoining properties by virtue of the excessive building bulk, scale and mass of the upper floor and its associated non-compliant envelope.
18. The site is not suitable for the proposal pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979* in that this area of the site is unsuitable for a development of such excessive bulk and scale.
19. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.
20. The proposal does not satisfy Section 4.15(1)(d) of the *Environmental Planning and Assessment Act 1979* in that the proposal does not adequately address the amenity of neighbours
21. The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest. The proposed development will have a detrimental impact on the amenity of adjoining residential properties, and for this reason is contrary to the public interest.

## G. CONCLUSION

The proposed development is not consistent with the intent of the SEPP, LEP standards and DCP controls as they are reasonably applied to the proposal.

The variations to SEPP, LEP standards and DCP controls are considered unreasonable in this instance. The cumulative effect on these non-compliances causes considerable amenity loss to my clients' property.

The development will not sit well within the streetscape with non-compliance to SEPP, LEP standards and DCP controls causing considerable concern. In this regard, the proposal is considered excessive in bulk and scale and would be considered jarring when viewed from the public domain.

Commissioner Moore revised the NSWLEC planning principle for assessing impacts on neighbouring properties within *Davies v Penrith City Council* [2013] NSWLEC 1141

*"The following questions are relevant to the assessment of impacts on neighbouring properties:*

*How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?*

*How reasonable is the proposal causing the impact?*

*How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?*

*Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?*

*Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?"*

My clients contend that the proposed development severely impacts my clients' property, and in terms of amenity, there is excessive sunlight, view or privacy loss. The loss is unreasonable. My clients' property is not vulnerable to the loss that is presented. The loss arises out of poor design, either through non-compliance to envelope controls or poorly located built form.

It is considered that the proposal is inappropriate on merit and unless amended plans are submitted, this DA must be refused for the following reasons:

- The application has not adequately considered and does not satisfy the various relevant planning controls applicable to the site and the proposed development.
- The proposed dwelling is incompatible with the existing streetscape and development in the local area generally.
- The proposed dwelling will have an unsatisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as unsuitable for the proposal, having regard to the relevant land use and planning requirements.

It is considered that the public interest is not served.

The proposed development does not follow the outcomes and controls contained within the adopted legislative framework.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended, it is considered that there are multiple matters which would prevent Council from granting consent to this proposal in this instance.

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts all of which would result in adverse impacts on my clients' property. Primarily,

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Inconsistent with the SEPP
- Inconsistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Inconsistent with the objectives of the DCP
- Inconsistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the EPAA1979

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, my clients' ask Council to REFUSE this DA.

We ask that if Council in their assessment of this application reveals unsupported issues, which prevent Council from supporting the proposal in its current form, and writes to the applicant describing these matters, we ask for that letter to be forwarded to us.

My clients trust that Council will support my clients' submission and direct the proponent to modify the DA plans, as outlined above. My clients ask Council Officers to inspect the development site from my clients' property so that Council can fully assess the DA.

Yours faithfully,

*Bill Tulloch*

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